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Supreme Court, U.S.
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No. 08 –

In The
Supreme Court of the United States

TODD S. MORROW
Petitioner,

v.

UNITED STATES ATTORNEY
PATRICK L. MEEHAN
OFFICE OF THE EASTERN DISTRICT OF
PENNSYLVANIA
Respondent.

On Petition For A Writ of Certiorari To The
United States Court of Appeals for the Third Circuit

PETITION FOR A WRIT OF CERTIORARI

Robert C. Keller, Esquire
Keller, Lisgar & Williams, LLP
101 E. Darby Road
Havertown, PA 19083
610-449-1400
Fax 610-449-4460

Counsel for Petitioner

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QUESTIONS PRESENTED

Whether the District Court erred by deciding that the issuance of a Writ of Mandamus for an International Arrest Warrant is a part of the prosecutorial function of the United States Attorney's Office rather than an administrative function.

Whether the District Court erred by granting the Respondent's Motion to Dismiss when Petitioner's Constitutional Due Process Rights had been violated and he was entitled to Mandamus.

TABLE OF CONTENTS

QUESTIONS PRESENTED.....i

TABLE OF CONTENTS.....ii

TABLE OF AUTHORITIES.....v

INTRODUCTION.....1

OPINION AND ORDER BELOW.....2

JURISDICTION.....2

STATUTES AND REGULATIONS INVOLVED.....2

STATEMENT OF THE CASE.....3

STATEMENT OF RELEVANT FACTS.....4

REASONS FOR GRANTING THE WRIT.....6

I. THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA ERRED BY DISMISSING PETITIONER'S COMPLAINT IN MANDAMUS.....7

A. Todd Morrow Is Entitled To The Issuance Of A Writ Of Mandamus.....7

1) Todd Morrow has no other adequate means to regain custody of his son without assistance from the United States government.....8

TABLE OF CONTENTS- Continued

2) Todd Morrow has a clear and indisputable right to the issuance of a Writ of Mandamus.....11

3) Awarding a Writ of Mandamus is appropriate under the specific circumstances present in this case.....12

B. Respondent's Reliance On Imbler v. Pachtman Is Misplaced.....12

C. Todd Morrow Has Been Unconstitutionally Denied Due Process of Law.....15

1) Todd Morrow Has Been Unconstitutionally Denied Procedural Due Process Of Law.....16

2) Todd Morrow Has Been Unconstitutionally Denied Substantive Due Process Of Law.....18

3) By Granting Respondent's Motion to Dismiss The Court Deprived Petitioner Of His Constitutional Right Of Access To The Courts.....19

II. THE ISSUANCE OF A WRIT OF MANDAMUS IS PROPER AND APPROPRIATE.....20

CONCLUSION.....22

TABLE OF CONTENTS- Continued

APPENDIX

Judgement and Opinion of Court of Appeals.....1a

District Court's Order.....10a

District Court's Memorandum.....11a

Appellant's Brief before the United States Court of Appeals for the Third Circuit.....15a

Appellee's Brief before the United States Court of Appeals for the Third Circuit.....55a

28 U.S.C. §1254.....88a

28 USCS § 1291.....89a

28 USCS § 1361.....90a

Fifth Amended To the Constitution of The United States Of America.....91a

Fourteenth Amended To the Constitution of The United States Of America.....92a

TABLE OF AUTHORITIES

Cases Page

Allied Chemical Corp. v. Daiflon, Inc., 449 U.S. 33, 101 S. Ct. 188, 66 L. Ed. 2d 193 (1980).....20

Bankers Life & Casualty Co. v. Holland, 346 U.S. 379, 74 S. Ct. 145, 98 L. Ed. 106 (1953).....20

Bernitsky v. U.S., 1620 F.2d 948 (3d Cir. 1980).....13

Cheney v. U.S. Dist. Dt. for Dist. of Columbia, 524 U.S. 367 (2004).....8

D.P. Enters., Inc. v. Bucks County Cmty. College, 725 F.2d 943 (3d Cir. 1984).....7

Fifth Ave. Peace Parade Comm. v. Hoover, 327 F.Supp. 238 (D.C.N.Y. 1971).....11

Hovey v. Elliot, 167 U.S. 409, 4147 (1897).....9

Imbler v. Pachtman, 424 U.S. 409 (1976).....12,13,14

In re Briscoe, 448 F.3d 201 (3d Cir. 2006).....7,8

In re Nwanze, 242 F.3d 521 (3d Cir. 2001).....8

In re Pressman-Gutman Co.,
459 F.3d 383 (3d Cir. 2006).....7

In Re Razzoli,
161 Fed. Appx. 203 (3d Cir. 2006).....20

Khan v. State Bd. Of Auctioneer Examiners,
577 Pa. 166 (Pa. 2004).....18

Mathews v. Eldridge,
424 U.S. 319 (1976).....16,17,18

Pooler v. U.S.,
787 F.2d 868 (3d Cir. 1986).....13,14

Santosky v. Kramer,
455 U.S. 745 (1982).....16

Schrob v. Catterson,
948 F.2d 1402 (3d Cir. 1991).....7

Stanley v. Ill.,
405 U.S. 645 (1972).....16

Tennessee v. Lane,
541 U.S. 509 (2004).....19

Troxel v. Granville,
530 U.S. 57 (2000).....11

United States v. Duell, 172 U.S. 576, 19 S. Ct. 286, 43 L. Ed. 559, 1899 Dec. Comm'r Pat. 287 (1899).....20

U.S. v. Wexler,
31 F.3d 117 (3d Cir. 1994).....9

Windsor v. Mcveigh,
93 U.S. 274, 277, 280 (1876).....19

STATUTES Page

28 U.S.C.A. § 1254 (West Supp. 2007).....2

28 U.S.C.A. § 1291 (West Supp. 2007).....2

28 U.S.C.A. § 1361 (West Supp. 2007).....2

CONSTITUTIONAL PROVISIONS Page

Fifth Amended To the Constitution of
The United States Of America.....passim

Fourteenth Amended To the Constitution of
The United States Of America.....passim

RULES Page

Fed. R. Civ. P. 12(B)(6).....7

INTRODUCTION

The United States Attorney General's office, as a part of the Executive Branch of the United States of America, is responsible for protecting the Constitutional Rights of U.S. citizens and enforcing the laws of the United States. While the U.S. Attorney claims that Petitioner is trying to force him to conduct a criminal prosecution, thus infringing on a discretionary function, in fact, the only thing that Petitioner is seeking is for the U.S. Attorney to utilize an administrative tool that lies exclusively in its possession. Specifically, Petitioner seeks for the U.S. Attorney to issue an International Arrest Warrant so that a known kidnapper may be retuned to U.S. soil and Petitioner's son, a U.S. citizen who has been kidnapped, can be returned to Petitioner. The Petitioner is not asking the U.S. Attorney to become responsible for prosecuting his ex-wife, who has kidnapped his son. He is only asking that the U.S. Attorney facilitate her capture so that the Commonwealth of Pennsylvania can prosecute her once she has been returned to U.S. soil. As such, the United States Attorney's Office is not being called upon in its role as prosecutor but rather its role as administrator.

The case law that the United States Attorney uses to support its claim that Petitioner is attempting to interfere with its prosecutorial functions is misplaced in the instant matter. Said case law deals with the question of whether or not it is within the sole discretion of the U.S. Attorney to initiate a criminal prosecution. While the U.S. Attorney may have sole discretion in determining whether or not to initiate a criminal prosecution,

the instant matter deals with whether or not the U.S. Attorney has infringed upon Petitioner's Constitutional rights by not utilizing an administrative tool that is exclusively within its province. The Petition does not seek to have the U.S. Attorney prosecute his ex-wife; rather he only wants it to facilitate her return to the U.S. to face prosecution by the Commonwealth of Pennsylvania, which lacks international authority of its own.

OPINION AND ORDER BELOW

The Order and Opinion of the United States Court of Appeals for the Third Circuit is reproduced in the Appendix at 1a through 9a.

JURISDICTION

The Respondent's Motion to Dismiss was affirmed by the United States Court of Appeals for the Third Circuit on December 19, 2007. Appendix at 1a through 9a. This Court has jurisdiction under 28 U.S.C. §1254.

STATUTES, REGULATIONS AND CONSTITUTIONAL PROVISIONS INVOLVED

28 U.S.C.A § 1254 (Reproduced at Appendix 88a)

28 U.S.C.A. § 1291 (Reproduced at Appendix 89a)

28 U.S.C.A. § 1361 (Reproduced at Appendix 90a)

Fifth Amended To the Constitution of The United States Of America (Reproduced at Appendix 91a)

Fourteenth Amended To the Constitution of The United States Of America (Reproduced at Appendix 92a)

STATEMENT OF THE CASE

This petition arises from the U.S. Attorney's refusal to perform its duties. In doing so, it violated Petitioner's Fifth and Fourteenth Amendment Rights. Specifically, Petitioner is seeking court intervention to force the U.S. Attorney's Office to assist Petitioner in the recovery of his child, a U.S. Citizen, who was kidnapped and taken to a foreign country. The Petitioner contends that by failing to act, Respondent has been derelict in its duty to Petitioner and violated Petitioner's Fifth and Fourteenth Amendment rights.

Petitioners sought assistance from the United States Attorney's Office in facilitating the return of his ex-wife and son to U.S. soil so that the Commonwealth of Pennsylvania could prosecute his ex-wife and return his son to him. As the Commonwealth of Pennsylvania lacks any international authority, the only means by which Petitioner can force his ex-wife to return his son to U.S. soil is through the issuance of an International Arrest Warrant, which can only be issued by the United States Attorney's Office.

On December 29, 2005, after the U.S. Attorney's Office refused to issue said warrant, Petitioner filed a Complaint in Mandamus in the United States District Court for the Eastern District

of Pennsylvania. On March 13, 2006, Respondent filed a Motion to Dismiss, which was subsequently granted by The Honorable Ronald L. Buckwalter of the United States District Court for the Eastern District of Pennsylvania on August 24, 2006. Judge Buckwalter's Order and Opinion are reproduced in the Appendix at 10a through 14a.

Petitioner appealed Judge Buckwalter's Order dismissing his Complaint to the United States Court of Appeals for the Third Circuit. On December 18, 2007, the United States Court of Appeal for the Third Circuit affirmed the District Court's dismissal. Petitioner and Respondent's Briefs have been reproduced in the Appendix at 15a through 87a.

STATEMENT OF RELEVANT FACTS

Peitioner, Todd Morrow was married to Svetlana Stepnaya, a/k/a Svetlana Morrow and through her had one son, Sean Morrow. At the time of their marriage, Ms. Stepnaya was a Russian citizen who was attempting to gain her American citizenship. The two parties eventually separated and on May 29, 2003, the Court of Common Pleas of Delaware County Pennsylvania officially dissolved Mr. Morrow's marriage to Ms. Stepnaya. Prior to this dissolution, Mr. Morrow sought custody of his son, Sean Morrow. On January 3, 2001, the Honorable Kevin F. Kelly awarded joint legal custody of Sean Morrow to Mr. Morrow and Ms. Stepnaya. That same day, Judge Kelly issued an Order that prohibited either party from removing the child from the jurisdiction of Delaware County, Pennsylvania. On March 1, 2002, Judge Kelly

issued another Order that once again prohibited either party from removing Sean Morrow from the jurisdiction of Delaware County, Pennsylvania. Despite these Orders, Ms. Stepnaya kidnapped Sean Morrow and fled to Russia on October 28, 2002.

Because Ms. Stepnaya had directly violated the Court's Orders and absconded with Sean Morrow, Mr. Morrow filed a Petition for Contempt on November 4, 2002. On November 8, 2002, the Honorable Ann A. Osborne held that Svetlana Stepnaya, did willfully fail to comply with the custody Order and granted Mr. Morrow sole physical and legal custody of his son. On November 19, 2002, the Honorable Ann A. Osborne signed an Amended Order, correcting a typo from the November 8, 2002 Order, and ordering that Sean Morrow's passport be turned over to Mr. Morrow. On March 11, 2004, a hearing was held before the Honorable Chad Kenney to determine if Ms. Stepnaya was aware of both the November 8 and November 19 Orders before she fled to Russia. At the conclusion of the hearing, Judge Kenney held that Ms. Stepnaya, was in fact aware of both Orders at the time she fled to Russia and as such, willfully violated them.

To date, Ms. Stepnaya has refused, despite repeated requests, to return Sean Morrow to the jurisdiction of Delaware County, Pennsylvania and the custody of Mr. Morrow, as was ordered by Judge Osborne on November 19, 2002. As a result of Ms. Stepnaya's kidnapping of Sean Morrow and her failure to obey a lawful court order, a Pennsylvania Arrest Warrant was issued for her on June 3, 2004. Since Ms. Stepnaya is currently

residing in the Russian Federation, where she is a citizen, there is no means for enforcing said arrest warrant without the assistance of the United States Government.

To arrange for his son to be returned to him, Mr. Morrow contacted the United States Attorney's Office and requested that an International Arrest Warrant be issued for Ms. Stepnaya based on her actions and the Pennsylvania Arrest Warrant. An International Arrest Warrant was needed as the Pennsylvania Arrest Warrant lacks any authority outside of the country. The International Arrest Warrant was requested on the belief that if Ms. Stepnaya were to travel to a country that honors such warrants, she would be taken into custody and extradited to Delaware County, Pennsylvania to stand trial for her crimes. This would ensure that Sean Morrow would be returned to his father. However, to date, the United States Attorney's Office, through its agent David Webb, the Deputy Chief of the Criminal Division, has repeatedly refused to issue an International Arrest Warrant for Ms. Stepnaya or assist Mr. Morrow in recovering his son in any way. As such, Mr. Morrow continues to be deprived of his son and now seeks the Court's assistance in this matter.

REASONS FOR GRANTING THE WRIT

The compelling reason that this writ of certiorari should be granted by this Court is that a United States Citizen has been deprived of a fundamental right without due process of law as is provided for in the Fifth and Fourteenth

Amendments to the Constitution. Further, the appropriate remedy is a Writ of Mandamus.

I. THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA ERRED BY DISMISSING PETITIONER'S COMPLAINT IN MANDAMUS.

When considering a motion to dismiss pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure, all allegations in the pleadings must be accepted as true and the Petitioner must be given the benefit of every favorable inference that can be drawn from those allegations. Schrob v. Catterson, 948 F.2d 1402 (3d Cir. 1991). As such, "a complaint can only be dismissed if 'it appears to a certainty that no relief could be granted under any set of facts which could be proved.'" Id. (citing to D.P. Enters., Inc. v. Bucks County Community College, 725 F.2d 943,944 (3d Cir. 1984). Therefore, as the Petitioner's allegations entitle him to relief, the Respondent's Motion to Dismiss should have been denied.

A. Todd Morrow Is Entitled To The Issuance Of A Writ Of Mandamus.

Mr. Morrow has presented facts sufficient to entitle him to the issuance of a Writ of Mandamus. The Courts have established that three conditions must be met prior to the issuance of a Writ of Mandamus. See In re Pressman-Gutman Co., 459 F.3d 383, 399 (3d Cir. 2006); In re Briscoe, 448 F.3d 201, 212 (3d Cir. 2006). First, "the party seeking

issuance of the writ must have no other adequate means to attain the relief . . . ." Cheney v. U.S. Dist. Ct. for Dist. of Columbia, 524 U.S. 367, 380-81 (2004). Second, the party seeking the writ must establish that his right to issuance of the writ "is clear and indisputable." Id. at 381. Finally, "the issuing court, in exercise of its discretion, must be satisfied the writ is appropriate under the circumstances." Id.

1. **Todd Morrow has no other adequate means to regain custody of his son without assistance from the United States government.**

Todd Morrow has no adequate means to regain custody of his son. Mr. Morrow's son is being held outside of the jurisdiction of the United States and therefore Mr. Morrow has no alternative avenues for relief. In elaborating on what constitutes "no other adequate means," this Court in In re Nwanze stated that the issuance of a Writ of Mandamus should be reserved only for extraordinary circumstances. In re Nwanze, 242 F.3d 521, 524 (3d Cir. 2001). There, the petitioner's request for a Writ of Mandamus was denied because he was able to reinstitute his complaint through a habeas petition upon transfer to another prison jurisdiction. In re Nwanze at 527. As such, he was provided with other means to protect his interests. In addition to extraordinary circumstances, this Court has held that a party requesting a Writ of Mandamus must demonstrate that not granting the writ will cause irreparable injury. U.S. v. Wexler, 31 F.3d 117, 128 (3d Cir.

1994). In creating this standard of "no other adequate means," the Courts have sought "to ensure that the writ will not be used as a substitute for the regular appeals process." Cheney at 380-81. In the instant action, Mr. Morrow's situation demonstrates that he lacks other adequate means for relief due to the extraordinary circumstances of his situation. If unaided, Mr. Morrow will be irreparably injured.

The circumstances surrounding this case are extraordinary and can only be remedied through a Writ of Mandamus. Mr. Morrow was given full custody of his son by Order of the Court of Common Pleas of Delaware County. In clear violation of that Order, Ms. Stepnaya fled the country and kidnapped Sean Morrow. As a result, a Pennsylvania arrest warrant was issued for Ms. Stepnaya. However, the arrest warrant has no jurisdiction since Ms. Stepnaya has fled the United States to her native Russia. The only option available to Mr. Morrow was seeking the assistance of the United States government in facilitating the return of Ms. Stepnaya, and in turn Sean Morrow, to the jurisdiction of the Commonwealth of Pennsylvania. As such, Mr. Morrow sought the assistance of the United States Attorney's Office. However, when his request for assistance was denied, Mr. Morrow was presented with a situation in which he had no alternative course of action as there is no review process of the government's denial to assist him. As a result, Mr. Morrow's only alternative was to seek a Writ of Mandamus compelling the U.S. Attorney's Office to assist him in retrieving his son and thereby protecting his fundamental rights as a parent.

If the U.S. Attorney's Office does not assist Mr. Morrow, he will lose custody of his son forever. The facts of Mr. Morrow's Complaint demonstrate that there are not only extraordinary circumstances but also the fact that he will suffer irreparable injury by being denied access to his son forever should his request for relief be denied. Since, Mr. Morrow has pled facts sufficient to demonstrate extraordinary circumstances and irreparable harm, he has demonstrated that he posses no other adequate means to regain the custody of his son. Therefore, the District Court erred by granting Respondent's Motion to Dismiss.

Additionally, it is clear that Mr. Morrow is not trying to substitute his Complaint for a Writ of Mandamus for the regular appeals process. Rather, he is specifically seeking relief from a situation where no appeal process exists. The Pennsylvania Courts have already issued an Order granting him full custody over his son and an arrest warrant has been issued for Ms. Stepnaya. However, the Order and arrest warrant have no authority outside of the United States without the assistance of the United States Attorney's Office. Pursuant to the structure of the administrative office in question, the decision to assist Mr. Morrow lies exclusively in the hands of one individual. Said decision is not subject to review. Since refusing to assist in this matter, Mr. Morrow has been left with no other avenues through which to pursue his claim. The Appellee's denial of assistance leaves Mr. Morrow no other options. As such, the granting of Respondent's Motion to Dismiss was in error.

2. **Todd Morrow has a clear and indisputable right to the issuance of a Writ of Mandamus.**

Mr. Morrow has a clear and indisputable right for two reasons. One, his fundamental rights have been infringed and two, he lacks any other avenue of redress. The Supreme Court has established that, as a parent, Mr. Morrow has a fundamental and constitutional right to make decisions concerning the care, custody, and control of his child under the protections of the Due Process Clause of the Fourteenth Amendment. Troxel v. Granville, 530 U.S. 57, 66 (2000). In cases where a petitioner's fundamental and constitutional right is at stake, the Federal District Court of New York has held that the satisfaction of the requirements for a Writ of Mandamus can be construed liberally. See Fifth Ave. Peace Parade Comm. v. Hoover, 327 F. Supp. 238, 243 (D.C.N.Y. 1971). The Respondent, by its failure to act, has denied Mr. Morrow custody of his son. Thus to allow the Respondent to arbitrarily deny assistance to Mr. Morrow without any type of review would be to violate Mr. Morrow's fundamental rights as a parent without due process of law. As such, Mr. Morrow has shown that he has a clear and indisputable right to relief in the instant matter.

3. Awarding a Writ of Mandamus is appropriate under the specific circumstances present in this case.

Mr. Morrow has set forth facts that establish that a Writ of Mandamus is appropriate in this specific case. Denying Mr. Morrow's Petition for a Writ of Mandamus will cause him irreparable injury and leave him with no other alternative through which to pursue his claim. He will be denied access to his son and have no further avenues to pursue assistance. The circumstances in this case are extraordinary in nature and a Writ of Mandamus is the only reasonable and appropriate remedy available. Mr. Morrow has a clear and indisputable fundamental right to control the custody of his son, which is supported by a court Order granting him full custody. However, due to Ms. Stepnaya residing outside the United States, he is left with no means to protect or enforce his rights without government assistance. As the United States Attorney's Office has arbitrarily refused to assist Mr. Morrow, he has been and continues to be denied custody over his son and without recourse. Therefore, relief must come in the form of a Writ of Mandamus to compel the Respondent to act in this matter.

B. Respondent's Reliance On Imbler v. Pachtman Is Misplaced.

The Respondent's Reliance on Imbler v. Pachtman, 424 U.S. 409(1976) as the grounds for its Motion to Dismiss is misplaced and stretches the meaning of said case beyond its intended

holding. Imbler dealt with a suit for damages against a prosecuting attorney that derived from said attorney's actions during a prosecution. Id. In holding that a prosecutor has full rather than qualified immunity for his conduct during a prosecution, Justice Powell made clear that the Court's holding was limited to a prosecutor's actions that are intimately associated with the judicial phase of the criminal process. Id 430-31. As such, the holding does not apply to a prosecutor's conduct as an administrator or investigative officer. Id. In arriving at this holding, the Court made clear that its decision was based in part on the fact that to grant prosecutors full rather than qualified immunity for their actions taken during a criminal prosecution did not deprive a wronged party from having other avenues of recourse. Id at 428-29. Particularly, the Court specifically held that the Plaintiff in Imbler had criminal and professional disciplinary remedies available to him should they be appropriate. Id. In the case at bar, such considerations are not present and therefore Imbler's holding is not controlling.

In Pooler, the Court elaborated, while quoting Bernitsky v. United States, that "[d]ecision making as to investigation and enforcement, particularly when there are different types of enforcement action available, are discretionary judgments." Pooler v. U.S., 787 F.2d 868, 871 (3d Cir. 1986); Bernitsky v. U.S., 620 F.2d 948, 955 (3d Cir. 1980). However, the Court in Pooler appears to agree with the proposition set forth in Bernitsky that in instances where no other alternatives for enforcement exist, decision making as to

investigation and enforcement may be given less freedom of discretion. Pooler at 871.

Looking at the case at bar, the court is presented with a completely different set of circumstances than those presented in Imbler. While Imbler was based on a suit for damages against a prosecutor for his conduct during a prosecution, the present matter seeks a Writ of Mandamus to compel the United States Attorney's Office to perform its administrative function of assisting an American Citizen in retrieving a foreign fugitive to stand trial in the Commonwealth of Pennsylvania with the intent of returning an abducted citizen to his father. Respondent casts Petitioner's suit as one requiring the federal government to prosecute an alleged criminal. However, while it is clear that the federal government has been grossly derelict in its duty to uphold the laws of the United States, the Petitioner, in fact, only seeks assistance in recovering his son. To do so only requires the United States Government to issue an International Arrest Warrant to supply the avenue for facilitating the return of a kidnapped child to his father. Once Ms. Stepnaya is returned to American soil along with Sean Morrow, the Commonwealth of Pennsylvania would provide the legal apparatus necessary for ensuring that justice is served. As such, the United States Attorney's office is not being called upon in its role as prosecutor but rather its role as administrator.

Petitioner, Todd Morrow's, situation is also different from what was present in Imbler in that he lacks any other recourse for the wrong that has been committed against him. One of the

fundamental rationales that this Court used in explaining its decision in Imbler was that a prosecutor was not given unfettered immunity regardless of his actions. This Court cited to both criminal and professional disciplinary measures that are in place to ensure a prosecutor does not overstep his bounds. However, these safeguards that are essential to the ruling in Imbler, are not present in the current matter. Mr. Morrow does not have any other course of action. The Commonwealth of Pennsylvania lacks the means necessary for seeking the extradition of a foreign national. Mr. Morrow is forced to rely on the federal government to protect his Constitutional right to the custody of his son. Once the United States Attorney, through its agent Mr. Webb, arbitrarily turned down his request for assistance, Mr. Morrow was left without remedy. His only course of action was to turn to the courts for help. No other apparatus exists for assisting an individual in his situation.

C. Todd Morrow Has Been Unconstitutionally Denied Due Process of Law.

The Fifth and Fourteenth Amendments provide that neither the United States nor state governments shall deprive any person "of life, liberty, or property without due process of law." This Court has clearly designated two forms of due process to which an individual is entitled. There is Procedural Due Process and Substantive Due Process. As Todd Morrow has had both his Procedural and Substantive Due Process rights violated, he is entitled to relief.

1. **Todd Morrow Has Been Unconstitutionally Denied Procedural Due Process Of Law.**

Todd Morrow has been unconstitutionally denied Procedural Due Process of law because the government failed to provide him with any procedural safeguards for protecting his fundamental right to the custody of his child. It is well settled that parents have a liberty interest in the custody of their children. Santosky v. Kramer, 455 U.S. 745, 753, 71 L. Ed. 2d 599, 102 S. Ct. 1388 (1982); Stanley v. Illinois, 405 U.S. 645, 651, 31 L. Ed. 2d 551, 92 S. Ct. 1208 (1972). Hence, any deprivation of that interest by the state must be accomplished by procedures meeting the requirements of due process. Id. Once it has been determined that a fundamental right is involved, the next step is to determine what amount of process is due.

This Court developed a balancing test for determining what procedures are required when there has been a deprivation of life, liberty or property and due process is required. Mathews v. Eldridge, 424 U.S. 319 (1976). In evaluating what process is required, this Court established three factors that must be balanced. These factors, as explained in Mathews, are: "First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens

that the additional or substitute procedural requirements would entail." Mathews, 424 U.S. at 335. In the present matter, a balancing of these factors demonstrate that Mr. Morrow's Procedural Due Process rights have been violated and as such the Respondent's Motion to Dismiss should have been denied.

In applying the balancing test from Mathews v. Eldridge to the present matter, the balance clearly weighs in favor of granting Mr. Morrow procedures that until now he has been denied access to. Mr. Morrow has been denied the custody of his son, a right that has clearly been designated as fundamental by this Court. Currently, no procedures exist for ensuring that the U.S. government acts appropriately in assisting an aggrieved party in protecting their rights in maintaining the custody of their children when one is abducted to a foreign country. A system that provides no safeguards for preventing arbitrary and unreasonable decisions can hardly be classified as one that adequately provides procedures for preventing erroneous deprivations of fundamental rights. The government's interest should be in protecting the fundamental rights of its citizens. To introduce procedural safeguards to the process of seeking out the government's assistance in facilitating the return of kidnapped citizens would not provide much of a burden on the government, but would provide significant protections to the fundamental rights of its citizens. As no system exists, there are no alternative procedures that the government could argue could fill this void. As such, the Mathews v. Eldridge test demonstrates that Mr. Morrow has been

deprived of procedural due process; therefore, his complaint made a claim upon which relief may have been granted.

2. Todd Morrow Has Been Unconstitutionally Denied Substantive Due Process Of Law.

Todd Morrow has been unconstitutionally denied substantive due process of law by being deprived of the fundamental right to his son. As previously explained, this Court has held that the right to the custody of one's children is a fundamental right. Therefore, any infringement on this right must meet the burden of satisfying strict scrutiny. Khan v. State Bd. Of Auctioneer Examiners, 577 Pa. 166 (Pa. 2004). To satisfy the strict scrutiny test, the government action will be upheld only if it is necessary to promote a compelling or overriding interest. Id.

In the case at bar, the government's actions cannot meet the very high standard of strict scrutiny. The government action, namely the arbitrary denial of the issuance of an International Arrest Warrant to assist in the recovery of a citizen's child, is not necessary to promote a compelling or overriding interest. Further, the government is unable to supply a compelling or overriding interest that would ever justify the lack of procedural guidelines in place of arbitrary decision making when dealing with the issuance of International Arrest Warrants sought to assist a local government in obtaining the return of a kidnapped child to the custody of his parent.

3. **By Granting Respondent's Motion to Dismiss The Court Deprived Petitioner Of His Constitutional Right Of Access To The Courts.**

Petitioner was deprived of his constitutional right of access to the courts when the District Court granted Respondent's Motion to Dismiss because the Petitioner has no other avenue for redress. This Court has long held that the right to be heard in court is an essential aspect of due process. Windsor v. Mcveigh, 93 U.S. 274, 277, 280 (1876). See generally, Hovey v. Elliot, 167 U.S. 409, 4147 (1897); Tennessee v. Lane, 541 U.S. 509 (2004). In the present matter, by granting Respondent's Motion to Dismiss, Petitioner's fundamental right to having access to the courts was violated.

In the case at bar, Mr. Morrow is presented with a situation where he was forced to seek the assistance of the government without established procedures for doing so. As such, the decision whether or not to render aid rested solely on the arbitrary decision of one man whom the government would contend lacks any and all accountability for his actions. As Respondent's Motion to Dismiss was granted, Mr. Morrow was left without any recourse whatsoever from an arbitrary decision made by a man with no accountability when dealing with the fundamental right of maintaining custody of one's child. The fundamental underpinning of providing access to the courts is to ensure that the various branches of government do not act in an arbitrary and capricious manner. This is a key principle behind the checks and balances system of government

under which we live. However, Mr. Morrow has been presented with a situation where his fundamental right to maintain custody of his child was infringed upon without any sort of procedural safeguards and now the government contends that such an arbitrary decision is immune from judicial review. As such, by granting Respondent's Motion to Dismiss, the District Court concurred with such an analysis with the effect of unconstitutionally denying a person of his right to access to the courts.

II. THE ISSUANCE OF A WRIT OF MANDAMUS IS PROPER AND APPROPRIATE.

The issuance of a Writ of Mandamus is proper and appropriate because the Petitioner has no other adequate means of relief. Further, his right to relief is clear and indisputable. The remedy of mandamus is one that is available in extraordinary circumstances. In Re Razzoli, 161 Fed. Appx. 203 (3d Cir. 2006). To show entitlement to it, a Petitioner must show that he has "no other adequate means available to obtain the desired relief and that the right to issuance of the writ is 'clear and indisputable.'" Id. (citing Allied Chemical Corp. v. Daiflon, Inc., 449 U.S. 33, 35, 101 S. Ct. 188, 190, 66 L. Ed. 2d 193 (1980)(quoting Bankers Life & Casualty Co. v. Holland, 346 U.S. 379, 384, 74 S. Ct. 145, 148, 98 L. Ed. 106 (1953)(quoting United States v. Duell, 172 U.S. 576, 582, 19 S. Ct. 286, 287, 43 L. Ed. 559, 1899 Dec. Comm'r Pat. 287 (1899)).

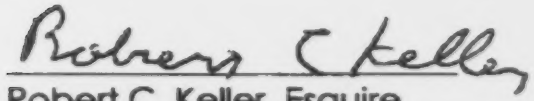
In the case at bar, Mr. Morrow has several valid claims against the United States government since his due process rights have been violated. As

such, his claim to relief is clear and indisputable. The relief must come in the form of a Writ of Mandamus because no other relief would remedy the particular harm that he has suffered. Therefore, because Mr. Morrow can demonstrate that he has no other means available to obtain the desired relief and his right to such relief is clear and undisputable, the Respondent's Motion to Dismiss should have been denied.

CONCLUSION

By refusing to assist Petitioner, Respondent has infringed upon his due process rights provided for under the Constitution. Accordingly, as Mr. Morrow has pled facts, that if proved, would support his entitlement to a Writ of Mandamus, the District Court erred as a matter of law in granting Respondent's Motion to Dismiss. Mr. Morrow can demonstrate that he has no other adequate means of obtaining relief, his right to Mandamus is clear and indisputable, and the writ is appropriate under the specific circumstances of this case. Further, the Discretionary Function Exception does not apply to the case at bar. Therefore, the United States Court of Appeal for the Third Circuit and United States District Court for the Eastern District of Pennsylvania must be reversed and Petitioner's Complaint reinstated.

This petition for a writ of certiorari should be granted.



Robert C. Keller, Esquire
Keller, Lisgar & Williams, LLP
101 E. Darby Road
Haverlown, PA 19083
610-449-1400
Fax 610-449-4460

Counsel for Petitioner

March 2008

No. 08 –

In The
Supreme Court of the United States

TODD S. MORROW
Petitioner,

v.

UNITED STATES ATTORNEY
PATRICK L. MEEHAN
OFFICE OF THE EASTERN DISTRICT OF
PENNSYLVANIA
Respondent.

On Petition For A Writ of Certiorari To The
United States Court of Appeals for the Third Circuit

APPENDIX

Robert C. Keller, Esquire
Keller, Lisgar & Williams, LLP
101 E. Darby Road
Havertown, PA 19083
610-449-1400
Fax 610-449-4460

Counsel for Petitioner

March 2008

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 06-4241

TODD S. MORROW,
Appellant

v.

PATRICK L. MEEHAN,

Appeal from the United States District Court
for the Eastern District of Pennsylvania
(D.C. Civil No. 05-cv-6786)
District Judge: Honorable Ronald L. Buckwalter

Submitted Under Third Circuit LAR 34.1(a)
December 11, 2007

Before: RENDELL and STAPLETON, *Circuit Judges*,
and IRENAS,* *Senior District Judge*.

JUDGMENT

This cause came on to be considered on the record from the United States District Court for the Eastern District of Pennsylvania and was submitted under Third Circuit LAR 34.1(a) on December 11, 2007. On consideration whereof, it

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* Honorable Joseph E. Irenas, Senior United States District Judge for the District of New Jersey, sitting by designation.

is now here ORDERED and ADJUDGED by this Court that the order of the District Court entered on August 25, 2006, be, and the same are hereby, AFFIRMED. All of the above in accordance with the opinion of this Court. Costs taxed against Appellant.

SEAL OF THE UNITED STATES
COURT OF APPEALS FOR THE
THIRD CIRCUIT

A true copy

Attest: /s/ Marcia M. Waldron
Marcia M. Waldron, Clerk

/s/ Marcia M. Waldron,
Clerk

DATED: December 19, 2007

Certified as a true copy and issued in lieu
of a formal mandate on 2/12/08

Teste: /s/ Marcia M. Waldron
Clerk, U.S. Court of Appeals for the Third Circuit

NOT PRECEDENTIAL

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 06-4241

TODD S. MORROW,
Appellant

v.

PATRICK L. MEEHAN

Appeal from the United States District Court
for the Eastern District of Pennsylvania
(D.C. Civil No. 05-cv-6786)
District Judge: Honorable Ronald L. Buckwalter

Submitted Under Third Circuit LAR 34.1(a)
December 11, 2007

Before: RENDELL and STAPLETON, *Circuit Judges*,
and IRENAS,* *Senior District Judge*.

(Filed: December 19, 2007)

OPINION OF THE COURT

IRENAS, *District Judge*.*

Appellant, Todd S. Morrow, appeals the

---

* Honorable Joseph E. Irenas, Senior United States District Judge for the District of New Jersey, sitting by designation.

District Court's decision dismissing his Complaint pursuant to Federal Rule of Civil Procedure 12(b)(6) for failure to state a claim upon which relief can be granted. The Complaint requested a writ of mandamus ordering the United States Attorney's Office ("U.S.A.O.") to issue an "International Arrest Warrant" for his ex-wife. We will affirm.

I.

Todd Morrow ("Morrow") had a child, Sean, with his ex-wife, Svetlana Stepnaya ("Stepnaya").[1] In January of 2001 and March of 2002 a Pennsylvania state court issued orders awarding joint custody of Sean to both parents, and prohibiting either parent from removing Sean from Delaware County. On October 28, 2002, however, Stepnaya fled with Sean to Russia. Approximately one month later, in November, 2002, the state court issued a contempt order due to Stepnaya's willful failure to comply with the previous orders, and granted sole custody of Sean to Morrow. At a hearing on March 11, 2004, the Pennsylvania Court of Common Pleas found that Stepnaya was aware of the court orders when she fled.

On June 3, 2004, the Pennsylvania state court issued an arrest warrant for Stepnaya due to her interference with Sean Morrow's custody. Morrow then contacted the U.S.A.O. and requested that an "International Arrest Warrant" be

[1] The record reveals that Morrow and Stepnaya separated, but does not reveal the date. It is clear, however, that on May 29 2003, their marriage was dissolved.

issued. Appellee, United States Attorney Patrick L. Meehan, did not issue an arrest warrant. On December 29, 2005, Morrow filed a Complaint in the Eastern District of Pennsylvania requesting that the Court issue a writ of mandamus compelling Meehan to issue a warrant for Stepnaya's arrest under the International Parental Kidnaping Crime Act, 18 U.S.C. § 1204 ("IPKCA"). He also alleged violations of the Fifth and Fourteenth Amendments to the United States Constitution.

In its Opinion, the District Court held that initiating a criminal prosecution is a discretionary function, and thus Morrow could not show a clear, indisputable right to a writ of mandamus. It further held that Morrow's constitutional allegations were not supported by case law, and dismissed the Complaint. This appeal followed.

II.

This Court has jurisdiction to review the District Court's order dismissing the Complaint pursuant to 28 U.S.C. § 1291. We review the District Court's mandamus decision for abuse of discretion, except that we review any non-discretionary elements *de nova*. *See Stehney v. Perry*, 101 F.3d 925, 929 (3d Cir. 1996) (noting that mandamus is a drastic remedy only to be invoked in extraordinary situations).

III.

A plaintiff seeking a writ of mandamus must show that he has (1) no other adequate

means to attain the relief desired, and (2) a clear and indisputable right to the writ he seeks. *See In re Nwanze*, 242 F.3d 521, 524 (3d Cir. 2001). Even if the plaintiff satisfies these requirements, however, the Court retains the discretion of whether to issue the writ of mandamus. *See id.; see also In re Patenaude*, 210 F.3d 135, 141 (3d Cir. 2000).

Morrow has not shown, and indeed cannot show, that he has a clear and indisputable right to a writ of mandamus, or that the government has a "clear nondiscretionary duty" to issue one. *Heckler v. Ringer*, 466 U.S. 602, 616 (1984). Morrow claims that his right to the writ is clear and indisputable because his fundamental rights as a parent have been infringed. Infringement of Morrow's right to sole custody of his child by his ex-wife's conduct does not demonstrate a clear and indisputable right to a writ.[2]

The District Court determined that because initiating a criminal prosecution is a discretionary function, Morrow cannot show that his right to a writ of mandamus is clear and indisputable. We agree. "Where a matter is committed to discretion, it cannot be said that a litigant's right to a particular result is `clear and indisputable.' *Allied Chemical Corp. v. Daiflon, Inc.*, 449 U.S. 33, 36 (1980) (citation omitted).

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[2] Moreover, Morrow has not, and ca not demonstrate that the government, either state or federal, has violated his constitutional right to make decisions about the custody of his child. Nothing that the government has done, or has failed to do, resulted in his loss of custody, control, or care of his son. Indeed, the Commonwealth of Pennsylvania granted sole custody to Morrow. It was Stepnaya who, in violation of the Commonwealth's Order, fled the country with Sean.

Morrow seeks an order compelling the U.S.A.O. to issue an arrest warrant under the International Parental Kidnaping Crime Act, 18 U.S.C. § 1204.[3] Commencing a prosecution under any criminal law is discretionary. "Prosecutorial decisions as to whether, when and against whom to initiate prosecution are quintessential examples of governmental discretion in enforcing the criminal law[.]" *Pooler v. United States, 787* F.2d 868, 871 (3d Cir. 1986); *see also Schrob v. Catterson*, 948 F.2d 1402, 1410 (3d Cir. 1991)(noting that most courts have upheld "prosecutorial immunity in cases involving the initiation of a prosecution, or the indictment or filing of charges against an individual").

Although Morrow casts his claim as a

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[3] Morrow contends that he is not requesting that the U.S.A.O. prosecute a criminal, but rather is asking the U.S.A.O. to "perform its administrative function of assisting an American Citizen in retrieving a foreign fugitive to stand trial in the Commonwealth of Pennsylvania[.]" (Appellant Br. 9). Not only has Morrow failed to cite any authority to support the proposition that it is an "administrative function" of the U.S.A.O. to issue an arrest warrant, but the issuance of a warrant is a function of the courts and is not possible without the initiation of a prosecution. *See* 18 U.S.C. § 3046 (citing Federal Rules of Criminal Procedure 4 and 9, which set forth the circumstances under which a court may issue an arrest warrant).

Constitutional violation,[4] it is clear that a

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[1] Morrow argues that his constitutional right to make decisions about the care, custody, and control of his child necessitates that the Court construe his ability to satisfy the requirements for a writ of mandamus liberally. He argues that this proposition is supported by *Fifth Avenue Peace Parade Committee v. Hoover*, 327 F. Supp. 238, 243 (S.D.N.Y. 1971), which states:

> there are occasions of deprivations of constitutional rights where satisfaction of the mandamus requirements might be viewed liberally . . . . But even with this most liberal interpretation, a court must have the benefit of some specific statutes or regulations against which to measure the duties said to have been specifically ignored by the defendant or defendants.

Id. (internal citations omitted). *Hoover*, however, is not only distinguishable, but the precise language upon which Morrow relies actually supports Meehan's argument. The plaintiffs in *Hoover* brought an action for injunctive relief as a result of the FBI's surveillance of their participation in demonstrations. Defendants moved to dismiss the action for lack of subject matter jurisdiction pursuant to Federal Rule of Civil Procedure 12(b)(1). The court held that plaintiffs' asserted basis for federal jurisdiction - that defendants had a duty not to violate plaintiffs' First and Fourth Amendment rights - "stretch[es] mandamus far beyond its proper limits." *Id.* Here, Meehan did not move to dismiss for lack of jurisdiction, but rather for failure to state a claim upon which relief can be granted pursuant to Federal Rule of Civil Procedure 12(b)(6). As in *Hoover*, Morrow cannot cite to any "specific statutes or regulations" that would demonstrate that a duty exists that Meehan ignored when he failed to issue an "International Arrest Warrant."

"private citizen lacks a judicially cognizable interest in the prosecution or nonprosecution of another." *Leeke v. Timmerman*, 454 U.S. 83, 85-86 (1981); *Sauter v. Johnson*, 857 F.2d 224, 227 (4th Cir. 1988) (holding that a citizen has no constitutional right to have a criminal prosecution initiated at this request); *cf. United States v. Berrigan*, 482 F.2d 171, 174 (3d Cir. 1973) (noting that "the government is permitted the conscious exercise of some selectivity in the enforcement of its criminal laws"(internal quotations omitted)). Accordingly, the District Court did not abuse its discretion in refusing to issue a writ of mandamus and dismissing Morrow's Complaint.

IV.

For the reasons set forth above, the judgment of the Eastern District of Pennsylvania dismissing the Complaint will be affirmed.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

TODD S. MORROW,	:	CIVIL ACTION
Plaintiff,	:	No. 05-6786
v.	:	
PATRICK L. MEEHAN,	:	
UNITED STATES ATTORNEY	:	
Defendants.	:	

ORDER

AND NOW, this 24th day of August, 2006, upon consideration of Defendant's Motion to Dismiss (Docket No. 6), Plaintiffs response thereto (Docket No. 8) and Defendant's Reply (Docket No. 9), it is hereby ORDERED that Defendant's Motion to Dismiss is GRANTED.

This case is CLOSED.

BY TIIE COURT:

/s/Ronald L. Buckwvalter, S. J.
RONALD L. BUCKWALTER, S.J.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

TODD S. MORROW,	:	CIVIL ACTION
Plaintiff,	:	No. 05-6786
v.	:	
PATRICK L. MEEHAN,	:	
UNITED STATES ATTORNEY	:	
Defendants.	:	

MEMORANDUM

BUCKWALTER, S.J. August 24, 2006

Presently before the Court are Defendant's Motion to Dismiss (Docket No. 6), Plaintiff's response thereto (Docket No. 8) and Defendant's Reply (Docket No. 9). As explained below, Defendant's Motion to Dismiss is granted.

I. BACKGROUND

Plaintiff is the father of Sean Morrow, a minor child born during Plaintiff's marriage to Ms. Svetlana Stepnaya.[5] In January 2001, a state court awarded joint custody of Sean Morrow to Plaintiff and Ms. Stepnaya and prohibited both parents from removing Sean Morrow from the jurisdiction

[5] Plaintiff's and Ms. Stepnaya's marriage was dissolved on May 29, 2003.

of Delaware County, Pennsylvania. In March 2002, the state court again issued an order prohibiting both parents from removing Sean Morrow from Delaware County.

On October 28, 2002, Ms. Stepnaya removed Sean Morrow from Delaware County and fled to Russia. In November 2002, the state court found that Ms. Stepnaya willfully failed to comply with the custody order and granted Plaintiff sole custody of Sean Morrow. In June 2004, the state court issued an arrest warrant for Ms. Stepnaya for her interference with a child's custody. Plaintiff later "contacted the U.S. Attorney's Office and requested that an International Arrest Warrant be issued for Ms. Stepnaya based on her actions and the Pennsylvania Arrest Warrant." (Pl.'s Br. 3.) Defendant Michael Meehan ("Defendant Meehan"), United States Attorney for the Eastern District of Pennsylvania, declined to issue such a warrant. To date, Ms. Stepnaya has not returned Sean Morrow to Delaware County or to Plaintiff's custody.

In this instant matter, Plaintiff has filed a Complaint in the Nature of Mandamus, requesting that this Court compel Defendant Meehan to issue a warrant for Ms. Stepnaya's arrest under the International Parental Kidnapping Crime Act, 18 U.S.C. § 1204. Plaintiff asserts that this Court has jurisdiction under 28 U.S.C. § 1361.

II. STANDARD

A motion to dismiss pursuant to Rule

12(b)(6) is granted where the plaintiff fails to state a claim upon which relief can be granted. Fed. R. Civ. P. 12(b)(6). This motion "'may be granted only if, accepting all well-pleaded allegations in the complaint as true, and viewing them in the light most favorable to [the] plaintiff, [the] plaintiff is not entitled to relief.' Maio v. Aetna, Inc., 221 F.3d 472, 481 (3d Cir. 2000) (quoting In re Burlington Coat Factory Sec. Litig., 114 F.3d 1410, 1420 (3d Cu. r1997)) (citations omitted). A court must accept all of the plaintiffs allegations as true and attribute all reasonable inferences in the plaintiff's favor. Alston v. Parker, 363 F.3d 229, 233 (3d Cir. 2004).

III. DISCUSSION

The writ of mandamus is a remedy reserved only for extraordinary circumstances. In re Nwanze, 242 F.3d 521, 524 (3d Cir. 2001). A petitioner seeking the issuance of a writ of mandamus must establish that he or she has no other adequate means of relief and that his or her right to the writ of mandamus is clear and indisputable. Id.

In the present case, the Court believes the central issue is whether the Court should order Defendant Meehan to enforce the International Parental Kidnapping Crime Act, 18 U.S.C. § 1204, against Ms. Stepnaya.[6] Initiating a criminal prosecution, which Plaintiff requests, is a

[6] Plaintiff also asserts that Defendant Meehan has violated his Fifth Amendment and Fourteenth Amendment rights under the United States Constitution. This argument is not supported by case law.

cretionary function. Pogler v. United States, 787
. 2 868, 871 (3d Cir. 1986) (citations omitted).
cause issuing a warrant and therefore initiating
riminal prosecution is discretionary, the Court
ds that Plaintiff cannot show his right to a writ of
ndamus is clear and indisputable. Thus,
fendant's Motion to Dismiss is granted.

CONCLUSION

For the foregoing reasons,
efendant's Motion to Dismiss is granted.
appropriate order follows.

BEST AVAILABLE COPY

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 06-4241

TODD S. MORROW

Appellant,

v.

UNITED STATES ATTORNEY PATRICK L. MEEHAN

Appellee.

On Appeal from the United States District Court
for the Eastern District of Pennsylvania
(D.C. No. 05-cv-06786)
District Judge: Honorable Ronald L. Buckwalter

BRIEF FOR APPELLANT

Robert C. Keller, Esquire
Keller, Lisgar & Williams, LLP
101 East Darby Road
Havertown, PA 19083
Phone – (610) 449-1400
Fax – (610) 449-4460
Attorney for Appellant

TABLE OF CONTENTS

TABLE OF CONTENTS.....ii

TABLE OF CITATIONS.....iv

STATEMENT OF SUBJECT MATTER AND APPELLATE JURISDICTION.....vi

STATEMENT OF ISSUES.....vii

STATEMENT OF THE CASE.....viii

STATEMENT OF RELATED CASES AND PROCEEDINGS.....xii

STANDARD OF REVIEW.....xiii

SUMMARY OF THE ARGUMENT.....xiv

ARGUMENT.....1

THE DISTRICT COURT ERRED AS A MATTER OF LAW IN GRANTING APPELLEE'S MOTION TO DISMISS.....1

A. Todd Morrow is Entitled to the Issuance of a Writ of Mandamus.....2

1. Todd Morrow has no other adequate means to regain custody of his son without assistance from the Unites States government.....2

2. Todd Morrow has a clear and indisputable right to issuance of a Writ of Mandamus.....5

3. Awarding a Writ of Mandamus is appropriate under the specific circumstances present in this case.....6

B. The Discretionary Function Exception Is Not Applicable In the Case at Bar.....7

C. Todd Morrow Has Been Unconstitutionally Denied Procedural Due Process of Law..... 11

CONCLUSION.....14

CERTIFICATION OF BAR MEMBERSHIP.....15

CERTIFICATION OF COMPLAINCE WITH FEDERAL RULE 32(a).....16

CERTIFICATE OF SERVICE.....17

CERTIFICATION OF IDENTICAL COMPLIANCE OF BRIEFS.....18

CERTIFICATION OF VIRUS CHECK.....19

TABLE OF CITATIONS

UNITED STATES SUPREME COURT CASES

Cheney v. U.S. Dist. Dt. for Dist. of Columbia,
524 U.S. 367 (2004).....2-3

Imbler v. Pachtman,
424 U.S. 409 (1976).....7-10

Mathews v. Eldridge,
424 U.S. 319 (1976).....11-13

Santosky v. Kramer,
455 U.S. 745 (1982).....11

Stanley v. Ill.,
405 U.S. 645 (1972).....11

Troxel v. Granville,
530 U.S. 57 (2000).....5

UNITED STATES COURT OF APPEALS, THIRD CIRCUIT CASES

Bernitsky v. U.S.,
1620 F.2d 948 (3d Cir. 1980).....8

Buck v. Hampton Twp. School Dist.,
452 F.3d 256 (3d Cir. 2006).....xiii

D.P. Enters., Inc. v. Bucks County Cmty. College,
725 F.2d 943 (3d Cir. 1984).....1

In re Briscoe,
448 F.3d 201 (3d Cir. 2006).....2

In re Nwanze,
242 F.3d 521 (3d Cir. 2001).....2-3

In re Pressman-Gutman Co.,
459 F.3d 383 (3d Cir. 2006).....2

Pooler v. U.S.,
787 F.2d 868 (3d Cir. 1986).....8

Schrob v. Catterson,
948 F.2d 1402 (3d Cir. 1991).....1

U.S. v. Wexler,
31 F.3d 117 (3d Cir. 1994).....3

UNITED STATES DISTRICT COURT CASES

Fifth Ave. Peace Parade Comm. v. Hoover,
327 F.Supp. 238 (D.C.N.Y. 1971).....5-6

STATUTES AND RULES

28 U.S.C.A. § 1291 (West Supp. 2007).....vi

28 U.S.C.A. § 1361 (West Supp. 2007).....vi

Fed. R. Civ. P. 12(B)(6).....1

STATEMENT OF SUBJECT MATTER AND APPELLATE JURISDICTION

The jurisdiction of the United States District Court for the Eastern District of Pennsylvania was invoked under the provisions of 28 U.S.C. § 1361 as the underlying complaint is an action to compel the Appellee to perform his official duty. 28 U.S.C.A. § 1361 (West Supp. 2007). The United States Court of Appeals for the Third Circuit has jurisdiction to review the Order and Opinion of the United States District Court for the Eastern District of Pennsylvania pursuant to Title 28 U.S.C. § 1291 based upon the district court's final order dated August 24, 2006 granting the Appellee's Motion to Dismiss. 28 U.S.C.A. § 1291 (West Supp. 2007).

STATEMENT OF ISSUES

1. Whether the District Court erred as a matter of law in granting Appellee's Motion to Dismiss Todd Morrow's Complaint in Mandamus?

2. Whether the Appellant is entitled to the issuance of a Writ of Mandamus?

3. Whether the Discretionary Function Exception serves to bar Appellant's action?

4. Whether Todd Morrow has been denied Procedural Due Process of law?

STATEMENT OF THE CASE

Appellant, Todd Morrow, seeks review of the order of the United States District Court for the Eastern District of Pennsylvania granting the United States Attorney's Office's Motion to Dismiss.

The underlying Complaint arises from the United States Attorney's refusal to assist Appellant, Todd S. Morrow, in recovering his child, a United States Citizen, who was kidnapped and taken to a foreign country. Mr. Morrow had been married to Svetlana Stepnaya, a/k/a Svetlana Morrow and through her had one son, Sean Morrow. (See Appendix Volume Two at 16).[7] At the time of their marriage, Ms. Stepnaya was a Russian citizen who was attempting to gain her American citizenship. However, the two parties eventually separated and on May 29, 2003, the Court of Common Pleas of Delaware County Pennsylvania officially dissolved Mr. Morrow's marriage to Ms. Stepnaya. Id. Prior to this dissolution, Mr. Morrow sought custody of his son, Sean Morrow. On January 3, 2001, the Honorable Kevin F. Kelly awarded joint legal custody of Sean Morrow to Mr. Morrow and Ms. Stepnaya. (R. at 23-24). That same day, Judge Kelly issued an Order that prohibited either party from removing the child from the jurisdiction of the Delaware County, Pennsylvania. Id. On March 1, 2002, Judge Kelly issued another Order that once again prohibited either party from removing Sean Morrow from the jurisdiction of Delaware County,

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[7] Hereinafter for citation purposes, Appendix Volume Two will be referred to as the Record; i.e. (R. at 16)

Pennsylvania. (R. at 25-26). Despite these Orders, Ms. Stepnaya kidnapped Sean Morrow and fled to Russia on October 28, 2002. (R. at 17).

On November 4, 2002, Mr. Morrow filed a Petition for Contempt because Ms. Stepnaya had directly violated the Court's Orders and absconded with Sean Morrow to Russia. (R. at 38-39). On November 8, 2002, the Honorable Ann A. Osborne held that Svetlana Stepnaya, did willfully fail to comply with the custody Order and granted Mr. Morrow sole physical and legal custody of his son. (R. at 42). On November 19, 2002, the Honorable Ann A. Osborne signed an Amended Order, correcting a typo from the November 8, 2002 Order, and ordering that Sean Morrow's passport be turned over to Mr. Morrow. (R. at 44). On March 11, 2004, a hearing was held before the Honorable Chad Kenney to determine if Ms. Stepnaya was aware of both the November 8 and November 19 Orders before she fled to Russia. (R. at 46-70). At the conclusion of the hearing, Judge Kenney held that Ms. Stepnaya, was in fact aware of both Orders at the time she fled to Russia and as such, willfully violated them. (R. at 66-67).

To date, Ms. Stepnaya has refused, despite repeated requests, to return Sean Morrow to the jurisdiction of Delaware County, Pennsylvania and the custody of Mr. Morrow, as was ordered by Judge Osborne on November 19, 2002. (R. at 17). As a result of Ms. Stepnaya's kidnapping of Sean Morrow and her failure to obey a lawful court order, a Pennsylvania Arrest Warrant was issued for her on June 3, 2004. (R. at 72). However, because Ms. Stepnaya is currently residing in the Russian

Federation, where she is a citizen, there is no means for enforcing said arrest warrant without the assistance of the United States Government.

To arrange for his son to be returned to him, Mr. Morrow contacted the United States Attorney's Office and requested that an International Arrest Warrant be issued for Ms. Stepnaya based on her actions and the Pennsylvania Arrest Warrant. An International Arrest Warrant was needed because the Pennsylvania Arrest Warrant lacks any authority outside of the country. (R. at 18). The International Arrest Warrant was requested on the belief that if Ms. Stepnaya were to travel to a country that honors such warrants, she would be taken into custody based on the warrant and extradited to Delaware County, Pennsylvania to stand trial for her crimes. This would ensure that Sean Morrow would be returned to his father. However, to date, the United States Attorney's Office, through its agent David Webb, the Deputy Chief of the Criminal Division, has repeatedly refused to issue an International Arrest Warrant for Ms. Stepnaya or assist Mr. Morrow in recovering his son in any way. As such, Mr. Morrow continues to be deprived of his son and now seeks the Court's assistance in this matter.

On December 29, 2005, Todd Morrow, filed a Complaint against Appellee seeking the issuance of a Writ of Mandamus. On March 13, 2006, Appellee filed a Motion to Dismiss, which was subsequently granted on August 24, 2006. Todd Morrow, through counsel, filed the instant timely

appeal on September 22, 2006.

STATEMENT OF RELATED CASES AND PROCEEDINGS

At present this office is unaware of any related cases or proceedings.

STANDARD OF REVIEW

The Court reviews a district court's decision granting a party's motion to dismiss de novo. Buck v. Hampton Twp. School Dist., 452 F.3d 256 (3d Cir. 2006).

SUMMARY OF THE ARGUMENT

The United States District Court for the Eastern District of Pennsylvania erred as a matter of law in granting the Appellee's Motion to Dismiss because Appellant, Todd Morrow, has set forth facts, which if proven, would entitle him to the relief requested. Mr. Morrow has requested a Writ of Mandamus to compel the U.S. Attorney's Office to issue an international arrest warrant against his former wife, Svetlana Stepnaya, for kidnapping his son and fleeing to Russia.

Mr. Morrow has presented facts sufficient to entitle him to the issuance of a Writ of Mandamus. First, Todd Morrow has no other adequate means to regain custody of his son without the assistance of the U.S. government because his son is being held outside the U.S. Therefore, issuance of the Writ is warranted based on the extraordinary circumstances presented as well as the irreparable injury Mr. Morrow will suffer if his Complaint for a Writ of Mandamus is denied. Second, Mr. Morrow has a clear and indisputable right to issuance of a Writ of Mandamus because his fundamental rights as a parent have been infringed. Additionally, he lacks any other avenue of redress. Lastly, the issuance of a Writ of Mandamus is appropriate under the specific circumstances presented in this case.

The Discretionary Function Exception, which grants prosecutors quasi-judicial immunity in determining whether to initiate a prosecution, is not applicable in the case at bar. This is because the exception was not created to grant

prosecutors total immunity in every situation. As the present situation is distinguishable from those that the Discretionary Function Exception was meant to apply too, the instant matter falls outside of the area covered by it and it does not bar Mr. Morrow's Complaint in Mandamus. Mr. Morrow is not seeking civil damages for wrongful prosecution in this case, but rather is trying to compel the U.S. Attorney's Office to carry out an administrative function to help retrieve his son. The U.S. Attorney's Office is the only entity upon which Mr. Morrow can rely in order to uphold his fundamental rights as a parent and to facilitate the return of his son to the U.S.

Finally, by refusing to take action in this matter, the U.S. Attorney's Office has unconstitutionally denied Mr. Morrow Procedural Due Process of law. The government has failed to provide him with any safeguards for protecting his fundamental right to the custody of his child. Allowing an official of the Executive Branch to wield unchecked discretion, without review, that infringes upon a citizen's fundamental rights violates due process. A balancing of Mr. Morrow's private interests along with the risks of erroneous deprivation of custody of his child against the government's interests in refusing to take action in this matter leans heavily in Mr. Morrow's favor. To introduce procedural safeguards in the form of allowing for judicial review would create a minimal burden upon the government, but would provide significant protections to the fundamental rights of citizens like Mr. Morrow. Therefore, Mr. Morrow's complaint makes a claim upon which relief may

be granted and the decision of the U.S. District Court or the Eastern District of Pennsylvania should be reversed.

ARGUMENT

I. THE DISTRICT COURT ERRED AS A MATTER OF LAW IN GRANTING APPELLEE'S MOTION TO DISMISS.

The United States District Court for the Eastern District of Pennsylvania erred as a matter of law in granting the Appellee's Motion to Dismiss because Appellant, Todd Morrow has set forth facts, which if proven, would entitle him to the relief requested. A motion to dismiss under Federal Rule of Civil Procedure 12(b)(6) will only be granted where a plaintiff fails to state a claim upon which relief can be granted. Fed. R. Civ. P. 12(B)(6). When considering a motion to dismiss pursuant to Rule 12(b)(6), all allegations in the pleadings must be accepted as true and the Plaintiff must be given the benefit of every favorable inference that can be drawn from those allegations. Schrob v. Catterson, 948 F.2d 1402 (3d Cir. 1991). As such, "a complaint can only be dismissed if 'it appears to a certainty that no relief could be granted under any set of facts which could be proved.'" Id. (citing to D.P. Enters., Inc. v. Bucks County Cmty. College, 725 F.2d 943, 944 (3d Cir. 1984). Since Appellant's Complaint sets forth facts sufficient to entitle him to the issuance of a Writ of Mandamus, the District Court erred as a matter of law when it granted Appellee's motion to dismiss. As such, the decision of the District Court dismissing Appellant's Complaint must be reversed.

A. Todd Morrow Is Entitled To The Issuance Of A Writ Of Mandamus.

Mr. Morrow has presented facts sufficient to entitle him to the issuance of a Writ of Mandamus. Courts have established that three conditions must be met prior to the issuance of a Writ of Mandamus. See In re Pressman-Gutman Co., 459 F.3d 383, 399 (3d Cir. 2006); In re Briscoe, 448 F.3d 201, 212 (3d Cir. 2006). First, "the party seeking issuance of the writ must have no other adequate means to attain the relief . . . ." Cheney v. U.S. Dist. Ct. for Dist. of Columbia, 524 U.S. 367, 380-81 (2004). Second, the party seeking the writ must establish that his right to issuance of the writ "is clear and indisputable." Id. at 381. Finally, "the issuing court, in exercise of its discretion, must be satisfied the writ is appropriate under the circumstances." Id.

1. Todd Morrow has no other adequate means to regain custody of his son without assistance from the United States government.

Todd Morrow has no adequate means to regain custody of his son. Mr. Morrow's son is being held outside of the jurisdiction of the United States and therefore Mr. Morrow has no alternative avenues for relief. In elaborating on what constitutes "no other adequate means," this Court in In re Nwanze stated that the issuance of a Writ of Mandamus should be reserved only for extraordinary circumstances. In re Nwanze, 242

F.3d 521, 524 (3d Cir. 2001). There, the petitioner's request for a Writ of Mandamus was denied because he was able to reinstitute his complaint through a habeas petition upon transfer to another prison jurisdiction. In re Nwanze at 527. As such, he was provided with other means to protect his interests. In addition to extraordinary circumstances, this Court has held that a party requesting a Writ of Mandamus must demonstrate that not granting the writ will cause irreparable injury. U.S. v. Wexler, 31 F.3d 117, 128 (3d Cir. 1994). In creating this standard of "no other adequate means," the Courts have sought "to ensure that the writ will not be used as a substitute for the regular appeals process." Cheney at 380-81. In the instant action, Mr. Morrow's situation demonstrates that he lacks other adequate means for relief due to extraordinary circumstances of his situation. If unaided, Mr. Morrow will be irreparably injured.

The circumstances surrounding this case are extraordinary and can only be remedied through a Writ of Mandamus. Mr. Morrow was given full custody of his son by Order of the Court of Common Pleas of Delaware County. (R. at 44). In clear violation of that Order, Ms. Stepnaya fled the country and kidnapped Sean Morrow. As a result, a Pennsylvania arrest warrant was issued for Ms. Stepnaya. (R. at 72). However, the arrest warrant has no jurisdiction since Ms. Stepnaya has fled the United States to her native Russia. The only option available to Mr. Morrow was seeking the assistance of the United States government in facilitating the return of Ms. Stepnaya, and in turn

Sean Morrow, to the jurisdiction of the Commonwealth of Pennsylvania. As such, Mr. Morrow sought the assistance of the United States Attorney's Office. However, when his request for assistance was denied, Mr. Morrow was presented with a situation in which he had no alternative course of action since there is no review process of the government's denial to help him. As a result, Mr. Morrow's only alternative was to seek a Writ of Mandamus compelling the U.S. Attorney's Office to assist him in retrieving his son and thereby protecting his fundamental rights as a parent.

If the U.S. Attorney's Office does not assist Mr. Morrow, he will lose custody of his son forever. The facts of Mr. Morrow's Complaint demonstrate that not only are there extraordinary circumstances but also the fact that should his request for relief be denied, he will suffer irreparable injury by being denied access to his son forever. Since, Mr. Morrow has pled facts sufficient to demonstrate extraordinary circumstances and irreparable harm, he has demonstrated that he posses no other adequate means to regain the custody of his son. Therefore, the District Court erred by granted Appellee's Motion to Dismiss.

Additionally, it is clear that Mr. Morrow is not trying to substitute his Complaint for a Writ of Mandamus for the regular appeals process. Rather, he is specifically seeking relief from a situation where no appeals process exists. The Pennsylvania Courts have already issued an Order granting him full custody over his son and an arrest warrant has been issued against Ms. Stepnaya.

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(R. at 44). However, the Order and arrest warrant have no authority outside of the United States without the assistance of the United States Attorney's Office. Pursuant to the structure of the administrative office in question, the decision to assist Mr. Morrow lies exclusively in the hands of one individual. Said decision is not subject to review. Since refusing to assist in this matter, Mr. Morrow has been left with no other avenues through which to pursue his claim. The denial of assistance by the Appellee leaves Mr. Morrow no other options. As such, the granting of Appellee's Motion to Dismiss was in error.

2. Todd Morrow has a clear and indisputable right to the issuance of a Writ of Mandamus.

Mr. Morrow has a clear and indisputable right for two reasons. One, his fundamental rights have been infringed and two, he lacks other avenue of redress. The Supreme Court has established that, as a parent, Mr. Morrow has a fundamental and constitutional right to make decisions concerning the care, custody, and control of his child under the protections of the Due Process Clause of the Fourteenth Amendment. Troxel v. Granville, 530 U.S. 57, 66 (2000). In cases where a petitioner's fundamental and constitutional right is at stake, the Federal Distirct Court of New York has held that the satisfaction of the requirements for a Writ of Mandamus can be construed liberally. See Fifth Ave. Peace Parade Comm. v. Hoover, 327 F.

f p. 238, 243 (D.C.N.Y. 1971). The Appellee, by failure to act, has denied Mr. Morrow custody of s son. Thus to allow the Appellee to arbitrarily ny assistance to Mr. Morrow without any type of v ew would be to violate Mr. Morrow's ndamental rights as a parent without due ccess of law. As such, Mr. Morrow has shown ct he has a clear and indisputable right to relief the instant matter.

3. Awarding a Writ of Mandamus is appropriate under the specific circumstances present in this case.

Mr. Morrow has set forth facts that establish nc.t a Writ of Mandamus is appropriate in this specific case. Denying Mr. Morrow's Petition for a Writ of Mandamus will cause him irreparable injury and leave him with no other alternative through which to pursue his claim. He will be denied access to his son and have no further avenues to pursue for assistance. The circumstances in this case are extraordinary in nature and a Writ of Mandamus is the only reasonable and appropriate remedy available. Mr. Morrow has a clear and indisputable fundamental right to control the custody of his son, which is supported by a court Order granting him full custody. (R. at 44 . However, due to Ms. Stepnaya residing outside the United States, he is left with no means to protect or enforce his rights without government assistance. As the United States Attorney's Office has arbitrarily refused to assist Mr. Morrow, he has been and continues to be denied custody over his

son and without recourse. Therefore, relief must come in the form of a Writ of Mandamus to compel the Appellee to act in this matter.

B. The Discretionary Function Exception Is Not Applicable In the Case at Bar.

The Discretionary Function Exception does not bar Mr. Morrow's Complaint in Mandamus because the exception was not created to grant prosecutors total immunity in every situation. As such, the Appellee's reliance on Imbler v. Pachtman as the grounds for its Motion to Dismiss is misplaced and stretches the meaning of said case beyond its intended holding. Imbler dealt with a suit for damages against a prosecuting attorney that derived from said attorney's actions during a prosecution. Imbler v. Pachtman, 424 U.S. 409(1976). In holding that a prosecutor has full rather than qualified immunity for his conduct during a prosecution, Justice Powell made clear that the Court's holding was limited to a prosecutor's actions that are intimately associated with the judicial phase of the criminal process. Imbler, 424 U.S. at 430-31. As such, the holding does not apply to a prosecutor's conduct as an administrator or investigative officer. Id. In arriving at this holding, the Court made clear that its decision was based in part on the fact that to grant prosecutors full rather then qualified immunity for their actions taken during a criminal prosecution did not deprive a wronged party from having other avenues of recourse. Id at 428-29. Particularly, the Court specifically held that the

plaintiff in Imbler had criminal remedies and professional disciplinary remedies available to him should they be appropriate. Id.

Additionally, the Court in Imbler was concerned that providing any lower level of protection would damage the judicial system as a whole because it would cause prosecutors to be disinclined to vigorously undertake their duties out of fear of having to defend themselves against retaliatory suits. In the case at bar, such considerations are not present and therefore Imbler's holding is not controlling.

In Pooler, the Court elaborated, while quoting Bernitsky v. United States, that "[d]ecision making as to investigation and enforcement, particularly when there are different types of enforcement action available, are discretionary judgments." See Pooler at 871; Bernitsky v. U.S., 620 F.2d 948, 955 (3d Cir. 1980). However, the Court in Pooler appears to agree with the proposition set forth in Bernitsky that in instances where no other alternatives for enforcement exist, decision making as to investigation and enforcement may be given less freedom of discretion. Pooler at 871.

Looking at the case at bar, the court is presented with a completely different set of circumstances than those presented in Imbler. While Imbler was based on a suit for damages against a prosecutor for his conduct during a prosecution, the present matter seeks a Writ of Mandamus to compel the United States Attorney's Office to perform its administrative function of assisting an American Citizen in retrieving a foreign

fugitive to stand trial in the Commonwealth of Pennsylvania with the intent of returning an abducted citizen to his father. Appellee casts Plaintiff's suit as one requiring the federal government to prosecute an alleged criminal. However, while it is clear that the federal government has been grossly derelict in its duty to uphold the laws of the United States, the Plaintiff, in fact, only seeks assistance in recovering his son. To do so only requires the United States Government to issue an International Arrest Warrant to supply the avenue for facilitating the return of a kidnapped child to his father. Once Ms. Stepnaya is returned to American soil along with Sean Morrow, the Commonwealth of Pennsylvania would provide the legal apparatus necessary for ensuring that justice is served. As such, the United States Attorney's office is not being called upon in its role as prosecutor but rather its role as administrator.

Plaintiff, Todd Morrow's, situation is also different from what was present in Imbler in that he lacks any other recourse for the wrong that has been committed against him. One of the fundamental rationales that the Supreme Court used in explaining its decision in Imbler was that a prosecutor was not given unfettered immunity regardless of his actions. The Court cited to both criminal and professional disciplinary measures that are in place to ensure a prosecutor does not overstep his bounds. However, these safeguards that are essential to the ruling in Imbler, are not present in the current matter. Mr. Morrow does not have any other course of action. The

Commonwealth of Pennsylvania lacks the means necessary for seeking the extradition of a foreign national. Mr. Morrow is forced to rely on the federal government to protect his Constitutional right to the custody of his son. Once the United States Attorney, through its agent, Mr. Webb, arbitrarily turned down his request for assistance, Mr. Morrow was left without remedy. His only course of action was to turn to the courts for help. No other apparatus exists for assisting a man in his situation.

Further, unlike Imbler, Mr. Morrow is not seeking civil damages from the United States Attorney's Office nor is he a criminal appellee in this case. Rather, he is purely seeking a Writ of Mandamus to compel the Appellee to provide assistance through the only means available in retrieving a foreign fugitive to stand trial in the Commonwealth of Pennsylvania with the ultimate intent of regaining custody over his abducted child. Granting Mr. Morrow's Petition for a Writ of Mandamus will not create a risk of injury to the judicial process as it is aimed not at actions taken by the Appellee in carrying out his duties but rather at his inaction in enforcing the law and furthering a citizen's Constitutional and fundamental rights.

C. Todd Morrow Has Been Unconstitutionally Denied Procedural Due Process of Law.

Todd Morrow has been unconstitutionally denied Procedural Due Process of law because the

government failed to provide him with any procedural safeguards for protecting his fundamental right to the custody of his child. Allowing an official of the Executive Branch to wield unchecked discretion and infringe upon an individual's fundamental parental rights violates Procedural Due Process. As was stated before, it is well settled that parents have a liberty interest in the custody of their children. Santosky v. Kramer, 455 U.S. 745, 753 (1982); Stanley v. Ill., 405 U.S. 645, 651 (1972). Hence, any deprivation of that interest by the state must be accomplished by procedures meeting the requirements of due process. Id. Once it has been determined that a fundamental right is involved, the next step is to determine what amount of process is due.

The Supreme Court has developed a balancing test for determining what procedures are required when there has been a deprivation of life, liberty or property and due process is required. Mathews v. Eldridge, 424 U.S. 319 (1976). In evaluating what process is required, the Court has established three factors that must be balanced. These factors, as explained in Mathews, are: "First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirements would entail." Mathews, 424 U.S. at 335. In the present matter, a

balancing of these factors demonstrates that Mr. Morrow's Procedural Due Process rights have been violated and as such his Petition for a Writ of Mandamus should be granted.

In applying the balancing test from Mathews v. Eldridge to the present matter, the balance clearly weighs in favor of granting Mr. Morrow procedures that until now he has been denied access to. Mr. Morrow has been denied the custody of his son, a right that has clearly been designated as fundamental by the Supreme Court. Currently, no procedures exist at all for ensuring that the United States government acts appropriately in assisting an aggrieved party in protecting their rights in maintaining the custody of their children when one is abducted to a foreign country. A system that provides no safeguards for preventing arbitrary and unreasonable decisions can hardly be classified as one that adequately provides procedures for preventing erroneous deprivations of fundamental rights. The government's interest should be in protecting the fundamental rights of its citizens. To introduce procedural safeguards to the process of seeking out the government's assistance in facilitating the return of kidnapped citizens would not provide much of a burden on the government, but would provide significant protections to the fundamental rights of its citizens. As no system exists at all, there are no alternative procedures that the government could argue could fill this void. As such, the Mathews v. Eldridge test demonstrates that Mr. Morrow has been deprived of procedural due process;

therefore, his complaint makes a claim upon which relief may be granted.

CONCLUSION

As Mr. Morrow has pled facts, that if proven, would support his entitlement to a Writ of Mandamus, the District Court erred as a matter of law in granting Appellee's Motion to Dismiss. Mr. Morrow has demonstrated that he has no other adequate means of obtaining relief, his right to Mandamus is clear and indisputable, and the writ is appropriate under the specific circumstances of this case. As the Discretionary Function Exception does not apply to the case at bar, Mr. Morrow is therefore entitled to a Writ of Mandamus. Further, he has shown that he is entitled to relief because his Procedural Due Process rights have been infringed upon.

Wherefore the discussed reasons above, Appellant respectfully submits that the judgment of the United States District Court for the Eastern District of Pennsylvania be reversed.

Respectfully Submitted,

KELLER, LISGAR & WILLIAMS, LLP

Date: 3/12/07 **BY:** /s/ Robert C. Keller
ROBERT C. KELLER, ESQUIRE
Attorney for Appellant, Todd S. Morrow

Robert C. Keller, Esquire
Keller, Lisgar & Williams, LLP.
101 East Darby Road
Havertown, PA 19083
Phone- (610) 449-1400
Fax- (610) 449-4460
Pennsylvania Attorney Identification No. 30263

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

Todd S. Morrow 20 W. Ridley Avenue Ridley Park, PA 19078 Appellant	)	CIVIL ACTION No. 06-4241
vs.	)	
United States Attorney Patrick L. Meehan The United States Attorney's Office of the Eastern District of Pennsylvania 615 Chestnut Street Suite 1250 Philadelphia, PA 19106 Appellee	)	

CERTIFICATION OF BAR MEMBERSHIP

I, Robert C. Keller, Esquire, hereby certify that I have been admitted to practice law and am currently a member in good standing in the state of Pennsylvania and the United States Court

of Appeals for the Third Circuit. I have been admitted to practice in the United States Court of Appeals for the Third Circuit since the 4th day of May 1981.

KELLER, LISGAR & WILLIAMS, LLP

BY: /s/ Robert C. Keller
ROBERT C. KELLER, ESQUIRE
Attorney for Appellant,
Todd S. Morrow

Robert C. Keller, Esquire
Keller, Lisgar & Williams, LLP.
101 East Darby Road
Havertown, PA 19083
Phone- (610) 449-1400
Fax- (610) 449-4460
Pennsylvania Attorney Identification No. 30263

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United States Attorney Patrick L. Meehan The United States Attorney's Office of the Eastern District of Pennsylvania 615 Chestnut Street Suite 1250 Philadelphia, PA 19106 Appellee	)	

CERTIFICATION OF COMPLIANCE WITH FEDERAL RULE 32(a)

I, Robert C. Keller, Esquire, in compliance with type-volume limitation, typeface requirements, and type style requirements, hereby certify that:

1. This brief complies with the type-volume limitations of Fed. R. App. P. 32(a)(7)(B) because this brief contains 5,561 words, excluding parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii); and
2. This brief complies with the typeface requirements of Fed. R. App. P 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in proportionally spaced typeface using Microsoft Word Version 2002 in a 14 Pt. with serifs Times New Roman font.

KELLER, LISGAR & WILLIAMS, LLP

BY: /s/ Robert C. Keller
ROBERT C. KELLER, ESQUIRE
Attorney for Appellant,
Todd S. Morrow

Robert C. Keller, Esquire
Keller, Lisgar & Williams, LLP.
101 East Darby Road
Havertown, PA 19083
Phone- (610) 449-1400
Fax- (610) 449-4460
Pennsylvania Attorney Identification No. 30263

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United States Attorney Patrick L. Meehan The United States Attorney's Office of the Eastern District of Pennsylvania 615 Chestnut Street Suite 1250 Philadelphia, PA 19106 Appellee	)	

CERTIFICATE OF SERVICE

I, Robert C. Keller, Esquire, hereby certify that the original and ten true and correct copies of the attached appellate brief plus the original and four true and correct copies of the appendices were filed with the United States Court of Appeals for the Third Circuit Clerk's Office

this 12th day of March 2007 and that same was electronically submitted this same day and is available for viewing and downloading from the ECF system.

Further, two true and correct copies of the attached brief plus appendices were served upon the following individual, via personal service, this 12th day of March 2007.

Annetta Foster Givhan, Esquire
Assistant United States Attorney
United States Department of Justice
615 Chestnut Street Suite 1250
Philadelphia, PA 19106

KELLER, LISGAR & WILLIAMS, LLP

BY: /s/ Robert C. Keller
ROBERT C. KELLER, ESQUIRE
Attorney for Appellant,
Todd S. Morrow

Robert C. Keller, Esquire
Keller, Lisgar & Williams, LLP.
101 East Darby Road
Havertown, PA 19083
Phone- (610) 449-1400
Fax- (610) 449-4460
Pennsylvania Attorney Identification No. 30263

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CERTIFICATION OF IDENTICAL COMPLIANCE OF BRIEFS

I, Robert C. Keller, Esquire, hereby certify that the text of the attached appellate brief plus appendices filed electronically and filed in hard

copies are identical on this 12th day of March 2007.

KELLER, LISGAR & WILLIAMS, LLP

BY: /s/ Robert C. Keller
ROBERT C. KELLER, ESQUIRE
Attorney for Appellant,
Todd S. Morrow

Robert C. Keller, Esquire
Keller, Lisgar & Williams, LLP.
101 East Darby Road
Havertown, PA 19083
Phone- (610) 449-1400
Fax- (610) 449-4460
Pennsylvania Attorney Identification No. 30263

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CERTIFICATION OF VIRUS CHECK

I, Robert C. Keller, Esquire, hereby certify that the attached appellate brief plus appendices filed electronically were scanned and checked for viruses with the following virus software on this 12th

day of March 2007: Symantec AntiVirus, version 6/15/2005 rev. 8.

KELLER, LISGAR & WILLIAMS, LLP

BY: /s/ Robert C. Keller
ROBERT C. KELLER, ESQUIRE
Attorney for Appellant,
Todd S. Morrow

No. 06-4241

IN THE UNITED STATES COURT OF APPEALS

FOR THE THIRD CIRCUIT

TODD S. MORROW,

APPELANT,

V.

PATRICK L. MEEHAN,

APPELLEE.

ON APPEAL FROM ORDER GRANTING

MOTION TO DISMISS IN

CIVIL ACTION NO. 05-6786

IN THE UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF PENNSYLVANIA

BRIEF FOR APPELLEE

LAURIE MAGID
Acting United States Attorney
VIRGINIA A. GIBSON
Assistant United States Attorney
Chief, Civil Division
ANNETTA FOSTER GIVHAN
Assistant United States Attorney
615 Chestnut Street
Suite 1250
Philadelphia, PA 19106-4476
(215) 861-8316

TABLE OF CONTENTS

STATEMENT OF SUBJECT MATTER JURISDICTION..... 1

STATEMENT OF APPELLATE JURISDICTION..... 2

STATEMENT OF THE ISSUE AND STANDARD OF REVIEW..... 3

STATEMENT OF THE CASE..... 4

STATEMENT OF THE FACTS..... 6

STATEMENT OF RELATED CASES..... 10

SUMMARY OF THE ARGUMENT..... 11

ARGUMENT..... 12

CONCLUSION..... 25

A. MORROW HAD A HEAVY BURDEN TO DEMONSTRATE THAT THE ISSUANCE OF A WRIT OF MANDAMUS WAS APPROPRIATE.... 13

B. MORROW FAILED TO DEMONSTRATE ENTITLEMENT TO ISSUANCE OF A WRIT OF MANDAMUS..... 15

1. MORROW HAD NO "CLEAR AND INDISPUTABLE" RIGHT TO A WRIT OF MANDAMUS..... 16

2.MORROW HAD NO CONSTITUTIONAL RIGHT TO PROCURE THE ARREST OF HIS EX-WIFE..... 20

3.MORROW IS PURSUING OR HAS ALREADY PURSUED OTHER MEANS TO ATTAIN THE DESIRED RELIEF..... 22

4.EVEN IF ALL THE CRITERIA FOR A WRIT OF MANDAMUS HAD BEEN SATISFIED, THE COURTBELOW STILL HAD DISCRETION WHETHER TO ISSUE SUCH DRASTIC RELIEF..... 23

TABLE OF AUTHORITIES
Cases

Aerosource, Inc. v.Slater,
142 F.3d 572 (3d Cir. 1998) 15
Allied Chemical Co . v. Daiflon Inc.,
449 U.S. 33 (1980) 14, 16

Buck v Hampton Township School District,
452 F.3d 256 (3d Cir. 2006) 3
Carter y. City of Philadelphia,
181 F.3d 339 (3d Cir. 1999) 19
Dueser v. Vecera,
139 F.3d 1190 (8th Cir. 1998) 17
Dundore v. O'Donnell,
Civil Action No. 85-2907, 1985 WL
2681 (E.D. Pa. Sept. 17, 1985), aff'd,
791 F.2d 916 (3d Cir. 1986) 21
Franco v. Bureau of Prisons,
207 Fed. Appx. 145, 2006 WL
3521880
(3d Cir. Dec. 7, 2006) 3
Gray v. Bell ,
712 F.2d 490 (D.C. Cir. 1983) 19
Heckler v. Ringer,
466 U.S. 602 (1984) 14, 16

ICC v New York, New Haven & Hartford Railroad,
287 U.S. 178 (1932) 16
Imbler v. Pachtman,
424 U.S. 409 (1976) 12, 18, 20
Leeke v. Timmerman,
454 U.S. 83 (1981) 20

Hoag R.S. v. Richard D.,
410 U.S. 614 (1973) 21

Malley v. Briggs,
475 U.S. 335 (1986) 18

McDonough v. Ney,
599 F. Supp. 679 (D. Me. 1984) 21

Morrow v. Morrow, C.C.P. Delaware County,
Domestic Relations Division No. 00-
9695 10

In re Nwanze,
242 F.3d 521 (3d Cir. 2001) 14

Panko v. Rodak,
606 F.2d 168 (7th Cir. 1979) 23

In re Patenaude,
210 F.3d 135 (3d Cir. 2000) 15, 23

Pension Benefit Guaranty Corp. v.
White Consolidated industrial., Inc.,
998 F.2d 1192 (3d Cir. 1993) 13

Pooler v. United States,
787 F.2d.868 (3d Cir. 1986) 19

Ransom v. Marrazzo,
848 F.2d 398 (3d Cir. 1988) 13

Richardson v. United States,
465 F.2d 844 (3d Cir. 1972),
rev'd on other grounds,
418 U.S. 166 (1974).....15, 16

gttler v. Johnson,
857 F.2d 224 (4th Cir. 1988) 21

chrob v. Catterson,
948 F.2d 1402 (3d Cir. 1991).....19

Scotto v. Almenas,
143 F.3d 105 (2nd Cir. 1998).....17

lehnev v. Perry,
101 F.3d 925 (3d Cir. 1996) 3

ackwell v. United States Government,
472 F.3d 1242 (10th Cir. 2007).....23

hited States v. Berrician,
482 F.2d 171 (3d Cir. 1973)..... 21

hited States v. Wexler,
31 F.3d 117 (3d Cir. 1994).....14

'arris v. County of Delaware,
465 F.3d 129 (3d Cir. 2006) 19

Statutes and Rules

8 U.S.C. § 1204,
International Parental Kidnapping
Crime Act..... passim
28 V.S.C. § 1291.....2
28 U.S.C. § 1361.....1,13, 16
Fed. R. App. P. 32(a)(7).....26

Fed. R. Civ. P. 12(b) (6).....4, 13

STATEMENT OF SUBJECT MATTER JURISDICTION

This is an appeal from a final order in a mandamus action, Civil Action No. 05-6786, seeking to compel Patrick L. Meehan, the United States Attorney for the Eastern District of Pennsylvania, to pursue a criminal proceeding leading to the arrest of appellant's ex-wife.

The district court had jurisdiction over appellant's mandamus action under 28 U.S.C. § 1361, which governs actions to compel officers of the United States to perform duties allegedly owed appellant.

STATEMENT OF APPELLATE JURISDICTION

Based upon the timely filing of a notice of appeal from the order of the district court granting the motion to dismiss, this court has jurisdiction over this matter under 28 U.S.C. § 1291.

STATEMENT OF THE ISSUE AND STANDARD OF REVIEW

Did the district court properly dismiss appellant's mandamus action seeking an order compelling the United States Attorney to initiate a criminal proceeding and to arrest Morrow's ex-wife?

Standard of appellate review Ordinarily, appellate review of a district court's order granting a motion to dismiss is de novo, and the appellate court reviews the record under the same standards applicable in the district court. Buck v. Hampton Township School District., 452 F.3d 256, 260 (3d Cir. 2006). However, this Court reviews a "[d]istrict [c]ourt's mandamus decision for abuse of discretion, except for any non-discretionary elements, which are subject to de novo review." Franco v. Bureau of Prisons, 207 Fed. Appx. 145, 2006 WL 3521880, at *1 (3d Cir. Dec. 7, 2006); see also Stehney v. Perry, 101 F.3d 925, 929 (3d Cir. 1996) ("we typically review mandamus decisions for abuse of discretion").

STATEMENT OF THE CASE

Appellant, Todd S. Morrow, filed this mandamus action on December 29, 2005 seeking an order directing Patrick L. Meehan, the United States Attorney for the Eastern District of Pennsylvania, to pursue a criminal prosecution against Morrow's ex-spouse. Appendix ("App.") 15. Morrow sought to compel the United States Attorney "to prosecute" Morrow's ex-wife "for violation of 18 U.S.C. § 1204" by "issuing an international arrest warrant." App. 19-2.0.

Pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure, the United States Attorney moved the Court on March 13, 2006 for an order dismissing the action on the grounds that it failed to state a legally cognizable claim. App. 104-06.

The district court determined that "the central issue is whether the Court should order defendant Meehan to enforce the International Parental Kidnapping Crime Act, 18 U.S.C. § 1204 against Ms. Stepnaya" (Morrow's ex-wife). App. 3-6. The court concluded that "[blecause issuing a warrant and therefore initiating a criminal prosecution is

discretionary, the Court finds that Plaintiff cannot show his right to a writ of mandamus is clear and indisputable." Id. at 6. The district court granted the United States Attorney's motion to dismiss. Id. at 3-6.

STATEMENT OF THE FACTS

This mandamus action arises from a conflict over custody of a minor child. Morrow is the father. App. 49. The mother -- Morrow's ex-wife -- is from Russia. Id. at 49. The parents shared custody until 2002. Id. at 50. The parents were divorced in 2003. Id. at 4 n.1.

A. Summary of the background preceding Morrow's mandamus action in the district court

In February 2002, Morrow filed an emergency petition in state court to suspend the mother's custodial rights, stating that his petition was "based on the fear that she would be deported because of a failed attempt to gain citizenship." App. 38. The state court entered an order requiring both parents to surrender their passports and to refrain from international travel. Id.

In October or early November 2002, the mother returned to Russia with the child. App. 38. Within days, the state court, without a hearing, granted Morrow's petition for sole physical and legal custody of the minor child, suspended the mother's entitlement to support and directed that Morrow's passport and the passport of the minor child be returned to him. App. 37, 51.

In Russia, the mother retained Russian legal counsel. App. 50-51. Morrow also retained Russian legal counsel. Id. At least as of 2004, Morrow was participating in proceedings before a Russian Court "to hopefully enforce the November 2002 [state court] Order." Id.

Before leaving the United States, the mother had advised the attorney representing her in the state court proceedings that she was afraid of Morrow (App. 63) and that the mother feared Morrow was determined to have her deported, thus forever depriving her of her parental rights. Id. at 65.

B. The allegations in Morrow's mandamus complaint

Morrow claims that he is the father of a minor child born during a marriage which was dissolved in 2003. App. 16. In January 2001, a state court issued an order temporarily awarding Morrow and the child's mother joint legal custody of the child and prohibiting either parent from removing the child from Delaware County, Pennsylvania. Id. at 16, 22-24.

In March 2002, the state court issued another order again prohibiting removal of the child from Delaware

County. App. 16, 31-33. The second order followed Morrow's emergency petition to suspend the mother's custodial rights. Id. at 31-33. Morrow's petition was based on his alleged fear that the mother would be deported due to her unsuccessful attempt to gain citizenship. Id. at 38-40.

In October 2002, the mother went to Russia with the child in violation of the state court orders. App. 16. Morrow then filed a petition for contempt in the state court. Id. at 16, 38-40. In November 2002, the state court found the mother had willfully failed to comply with the custody order and granted Morrow sole custody. Id. at 17.

To date, the mother has not returned the minor child to Delaware County or to Morrow's custody. App. 17. In June 2003, the state court issued a warrant for the mother's arrest for interference with a child's custody. Id. at 18, 72.

In his complaint in this case, Morrow did not assert any claim against Patrick L. Meehan, the United States Attorney, in his individual capacity. Rather, Morrow attacked the alleged unconstitutionality of the United States Attorney's decision whether to make the mother the target of a federal criminal prosecution. App. 19. In

particular, Morrow alleged that he had "made a formal demand that the defendant [United States Attorney] fulfill his Constitutional duty as set forth in the Complaint, but the defendant refused and continues to refuse to do so." Id.

The specific constitutional violations advanced against the United States Attorney "in his role as the United States Attorney" were the alleged deprivations of Morrow's Fourteenth and Fifth Amendment rights to equal protection and due process of law. App. 18-19. Morrow sought an order compelling the United States Attorney "to prosecute" the mother "for violation of 18 U.S.C. § 1204" by "issuing an international arrest warrant ." id.at 19-20.

STATEMENT OF RELATED CASES

There are no known related cases in state or federal court apart from the divorce and custody action, Morrow v. Morrow, Domestic Relations Division No. 00-9695, Court of Common Pleas of Delaware County, Pennsylvania. However, there is or was a related judicial proceeding in the Russia courts.' App. 51.

SUMMARY OF THE ARGUMENT

A. A writ of mandamus is a drastic remedy that may only be granted in extraordinary circumstances where a petitioner has a "clear and indisputable" right to relief and has no other adequate means to attain the desired relief.

B. Morrow could not show that the United States Attorney failed to perform any clear, nondiscretionary duty. The criminal statute Morrow wanted "to enforce," the International Parental Kidnapping Crime Act, 18 U.S.C. § 1204, does not require a prosecution every time a child is removed from the United States. In supposed violation of a person's parental rights. To the contrary, federal prosecutors have broad discretion to choose cases in which arrest warrants should issue and which cases to prosecute. In addition, Morrow had "other adequate means to attain the desired relief."

ARGUMENT

Morrow's allegations here (and in the court below) are replete with references to his desire to see his ex-wife "stand trial for her crimes." Appellant's Brief ("App. Br.") at x.[8] He wants the United States Attorney to issue an international arrest warrant for his ex-wife. Id.

Considering the legal principles governing prosecutorial decisions whether to initiate and pursue criminal proceedings, as explained in the Supreme Court decision, Imbler v. Pachtman, 424 U.S. 409, 424 (1976), Morrow's request for a writ of mandamus had no merit.

The court below did not abuse its discretion in denying the writ because there was no set of facts which, if proven, would have entitled Morrow to the relief he requested, i.e., an order in the nature of a mandamus

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[8] Some pages in the body of Morrow's appellate brief are designated with lower case Roman numerals.

compelling the United States Attorney to arrest Morrow's exwife.[2]

A. Morrow had a heavy burden to demonstrate that the issuance of a writ of mandamus was appropriate

Morrow sought to have the court below issue a writ of mandamus pursuant to 28 U.S.C. 5 1361, the federal mandamus statute, to compel the United States Attorney to initiate a criminal proceeding against Morrow's ex-wife and arrest her. App. 11. This statute provides that "the district courts shall have original Jurisdiction of any action in the nature of mandamus to compel an officer or employee of the United States or any agency thereof to perform a duty owed to the plaintiff." 28 U.S.C. 5 1361.

The standards for issuance of such a writ are carefully circumscribed and highly stringent. "The writ of mandamus is a drastic remedy that a court should grant only

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[2] In considering the United States Attorney's motion to dismiss under Rule 12(b)(6) of the Federal Rules of Civil Procedure, the district court properly considered Morrow's allegations, along with matters of public record, such as court decisions. Pension Benefit Guaranty Corp. v. White Consolidated Industrial, Inc., 998 F.2d 1192, 1196 (3d Cir. 1993). The lawsuit was appropriately dismissed because Morrow could not prove any set of facts to support his claims for relief. Ransom v. Marrazzo, 848 F.2d 398, 401 (3d Cir. 1988).

in extraordinary circumstances in response to an act amounting to a . . . usurpation of power." In re Nwanze, 242 F.3d 521, 524 (3d Cir. 2001); Allied Chemical Corp. v. naiflon, Inc., 449 U.S. 33, 34 (1980)(same).

The Third Circuit in Nwanze reiterated the factors relevant to the issuance of a writ of mandamus, stressing that:

> Given its drastic nature, a writ of mandamus should not be issued [unless] . . . petitioner ha[s] no other adequate means to attain the desired relief, and . . . petitioner me[]t its burden of showing its right to the writ is clear and indisputable. Even when these prerequisites are met, issuance of the writ is largely discretionary . .
>
> Moreover, . . . "the clear error justifying the issuance of the writ should at least approach the magnitude of an unauthorized exercise of . . power."

Nwanze, 242 F.3d at 524-25 (citations omitted); United States v. Wexler, 31 F.3d 117, 128-29 (3d Cir. 1994)(same).

In addition, the party seeking the issuance of a writ of mandamus must have no other alternate means to attain the desired relief. Allied Chemical, 449 U.S. at 35; Heckler v. Ringer, 466 U.S. 602, 616-17 (1984) (relief

available only if "all other avenues of relief have been exhausted"); Aerosource, Inc. v. Slater, 142 F.3d 572, 582 (3d Cir. 1998) (mandamus only appropriate where "no alternative, adequate remedy"); Richardson v. United States, 465 F.2d 844, 849 (3d Cir. 1972) (en Banc) (plaintiff must have exhausted all other available means of relief), rev'd. on other grounds, 418 U.S. 166 (1974).

Even if the plaintiff satisfies his burden of establishing these requirements, the court still has discretion whether to issue a writ of mandamus. In re Patenaude, 210 F.3d 135, 141 (3d Cir. 2000). The court may refrain from issuing a writ of mandamus even where the technical grounds for issuing a writ of mandamus are satisfied. Id. Here, Morrow could not meet his heavy burden for the issuance of a writ of mandamus and his petition was properly denied.

B. Morrow failed to demonstrate entitlement to issuance of a writ of mandamus.

Morrow has not cited any case establishing a clear and indisputable right to have the United States Attorney take the action sought. The district court properly declined to issue a writ of mandamus under the governing

legal principles.

1. Morrow had no "clear and indisputable" right to a writ of mandamus.

A district court should not act under 28 U.S.C. S 1361 unless the plaintiff establishes that the plaintiff's right to relief is "clear and indisputable." Allied Chemical, 449 U.S. at 35; Richardson, 465 F.2d at 849; (challenged action or inaction must be "so plainly prescribed as to be free from doubt"); XCC v. New York, New Haven & Hartford Railroad, 287 U.S. 178, 191, 194, 204 (1932) (duty must be "peremptory and unmistakable," "certain," and "clear beyond debate").

Morrow does not allege, and cannot show, that the United States Attorney failed to perform any clear, nondiscretionary duty. Ringer, 466 V.S. at 616 (writ of mandamus available only where defendant owes plaintiff a "clear nondiscretionary duty"); Richardson, 465 F.2d at 849 (this "extraordinary" remedy is generally limited to situations where a federal official fails to perform "a specific, plain ministerial act" which he has a clear duty to perform).

Here, Morrow argues that he sought a mandamus

"to compel the [United States Attorney] to provide assistance .... in retrieving a foreign fugitive to stand trial in the Commonwealth of Pennsylvania." App. Br. at 10. However, the International Parental Kidnapping Crime Act, 18 U.S.C. § 1204, on its face, does not require a prosecution every time a child is removed from the United States, apparently obstructing another's parental rights. The statute lists a number of factors to be considered in determining whether a prosecution thereunder is appropriate, a clear demonstration of the discretionary nature of decision now challenged. 18 V.S.C. § 1204.

Moreover, the United States Attorney has broad discretion to choose the cases in which arrest warrants should issue followed by a prosecution under the criminal laws of the United States. Indeed, the decision to issue an arrest warrant compelling a person "to stand trial" requires a criminal prosecution, a wholly discretionary function. Moser v. Vecera, 139 F. 3d 1190, 1195 (8th Cir. 1998) ("Law enforcement decisions of the kind involved in making or terminating an arrest must be within the discretion" of law enforcement officials); Scotto v. Almenas, 143 F. 3d 105,

113 (2nd Cir. 1998) (the "discretionary decision to sign the arrest warrant . . was prosecutorial in nature").

No legal principle warranted Morrow's demand for an order compelling the United States Attorney to initiate and conduct a criminal prosecution. In Imbler v. Pachtman, 424 U.S. 409, 424-30 (1976), the Supreme Court held that, because prosecutorial discretion is so fundamental, a prosecutor is entitled to absolute immunity in deciding whether to initiate a criminal proceeding.[3]

The decision whether to pursue a criminal proceeding is at the heart of the prosecutorial decision making process. A prosecutor is "duty bound to exercise his best judgment both in deciding which suits to bring and in conducting them in court." Id. at 424. The integrity of the judicial process depends on a prosecutor's ability to exercise that judgment. Malley v. Briaos, 475 U.S.. 335, 343 (1986).

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[3] Although Morrow argues that absolute prosecutorial immunity does not bar his request for injunctive relief, App. Br. at 8-9, that argument begs the issue. The rationale underlying prosecutorial immunity, i.e., the ability to exercise discretion, is applicable here. In any event, the injunction Morrow seeks is barred by settled principles governing the issuance of a writ of mandamus.

As has been stressed in this Circuit, prosecutors have discretion, and:

> Prosecutorial decisions as to whether, when and against whom to initiate prosecution are quintessential examples of governmental discretion in enforcing the criminal law . .

Pooler v. United States, 787 F.2d 868, 871 (3d Cir. 1986) (citing cases and resolving claim arising from a criminal investigation under discretionary function of the Federal Tort Claims Act; quoting Gray v. Bell, 712 F.2d 490, 513 (D.C. Cir. 1983)); Yarris v. County of Delaware, 465 F.3d 129, 135 (3d Cir. 2006) (absolute immunity guards discretionary decisions of prosecutors and arises from "acts undertaken by a prosecutor in preparing for the initiation of judicial proceedings"); Carter v. City of Philadelphia, 181 F.3d 339, 356 (3d Cir. 1999) (absolute immunity guards discretionary. decisions of prosecutors and arises from "participation in court proceedings and other conduct intimately associated with the judicial phases of litigation").

Thus, a prosecutor has broad discretion in deciding whether a criminal prosecution should be undertaken. Schrob v. Catterson, 948 F.2d 1402, 1411 (3d

Cir. 1991)(citing Imbler it. Pachtman, 424 U.S. 409, 424 (1976)).

In the instant action, the United States Attorney has broad discretion to choose what cases he prosecutes under the criminal laws of the United States. Morrow was not entitled to the relief sought because it was within the United States Attorney's prosecutorial discretion whether to commence and pursue a criminal prosecution.

2. Morrow has no constitutional right to procure the arrest of his ex-wife.

There is no constitutional right to a criminal prosecution. The United States Attorney's motion to dismiss was properly granted for the additional reason that no law supports Morrow's proposition that the district court should have compelled the United States Attorney to undertake a criminal prosecution to avoid an alleged violation of Morrow's constitutional rights.

Citizens have no "constitutional right" to decide whether anyone in the United States Attorney's Office should undertake a criminal prosecution. Even prior to its decision in Imbler, the Supreme Court had made clear that "a private citizen lacks a judicially cognizable interest in the prosecution or nonprosecution of another." Leeke v.

Timmerman, 454 U.S. 83, 86 (1981) (per curiam); Linda R.S. v. Richard D., 410 U.S. 614, 619 (1973)(same); see also Sattler v. Johnson, 857 F.2d 224, 227 (4th Cir. 1988)(a person has no constitutional right to have a criminal prosecution undertaken at his behest); Dundore v. O'Donnell, Civil Action No. 85-2907, 1985 WL 2681 *2 (E.D. Pa. Sept. 17, 1985)(plaintiffs "have no constitutional right that I am aware to have criminal charges filed"), aff'd, 791 F.2d 916 (3d Cir. 1986).

Thus, although Morrow complained of alleged constitutional violations, he had no constitutionally protected right to enforce criminal laws against other people. As noted, "the government is permitted `the conscious exercise of some selectivity' in the enforcement of its criminal laws." United States v. Berrigan, 482 F.2d 171, 173-74 (3d Cir. 1973) quoting: Oyler v. Boyles, 368 U.S. 448, 456 (1962); McDonough v. Nev, 599 F. Supp. 679, 684 (D. Me. 1984) (holding AUSA was entitled to absolute immunity for his "discretionary prosecutive decision not to prosecute").

The United States Attorney's Office did not take Morrow's son from him. Morrow has nowhere showed a clear

and indisputable right to have the United States Attorney's Office return his son to him. He was not entitled to an order compelling the United States Attorney to undertake a criminal prosecution, and this action was properly dismissed.

3. Morrow is pursuing or has already pursued other means to attain the desired relief.

Morrow has not shown that he did not have "other adequate means to attain the desired relief," another factor militating against a writ of mandamus. The record here belies his repeated claim that he "lacks any other recourse for the wrong that has been committed against him." App. Br. at 9.

Morrow did not mention in his mandamus complaint or in his appellate brief that as of 2004 he was pursuing in a Russian court, or had already pursued in a Russian court, enforcement of the state court custody order. App. 51. In state court in March 2004, Morrow's attorney advised the court that Morrow "is now using the Russian Courts to hopefully enforce the November 2002 Order." Id. Even if Morrow ultimately is dissatisfied with the remedy in the Russian court (which results are not reflected in the record), id. at 45-69, the relevant consideration is that he

had an adequate alternative remedy.

4. Even if all the criteria for a writ of mandamus had been satisfied, the court below still had discretion whether to issue such drastic relief.

Assuming all the criteria for a writ of mandamus had been satisfied, the district court still had discretion whether to issue such drastic relief. In re Patenaude, 210 F.3d 135, 141 (3d Cir. 2000) (it is within a court's discretion to refrain from issuing a writ of mandamus even when the requirements for mandamus are technically satisfied). The availability of the writ does not compel its issuance. Id.

A district court's discretion to refuse mandamus relief even if elements otherwise justifying such relief are established may properly be exercised when, for example, mandamus relief would interfere with settled policies or procedures. Panko v. Rodak, 606 F.2d 168, 171 n.6 (7th Cir. 1979), distinguished on other grounds not relevant, Trackwell v. United States Government, 472 F.3d 1242, 1245 (10th Cir. 2007) (case involving subject matter jurisdiction issue). Thus, "considerations of judicial discretion provide an alternative basis for affirming [a] district court's denial of mandamus relief." Id

Here, Morrow failed to establish the criteria necessary for issuance of a writ of mandamus. Even had he done so, the district court still could have properly declined to issue the writ. Under the circumstances of this case, the district court properly exercised its discretion and dismissed the mandamus action.

CONCLUSION

For the foregoing reasons, this Court should affirm the district court's judgment in all respects.

Respectfully submitted

Laurie Magid
Acting United States Attorney

/s/ Virginia A. Gibson
Virginia A. Gibson
Assistant United States Attorney
Chief, Civil Division

/s/ Annetta Foster Givhan
Annetta Foster Givhan
Assistant United States Attorney

CERTIFICATE OF COMPLIANCE

The undersigned attorney for appellee certifies pursuant to Rule 32(a) (7) (C) of the Federal Rules of Appellate Procedure that appellee's brief, including this certificate, contains 3627 words and thus complies with Fed. R. App. P. 32(a) (7) (B) .

/s/ Annetta Foster Givhan
Annetta Foster Givhan
Assistant United States Attorney

CERTIFICATE OF VIRUS SCAN

The undersigned attorney for appellee certifies that the electronic version of this brief sent to the Court by e-mail was automatically scanned by ScanMail Real-Time Scan Monitor, version 3.82, and was found to contain no viruses. The text of the electronic copy of the brief is identical to the text of the paper copies filed with the Court.

/s/ Annetta Foster Givhan
Annetta Foster Givhan
Assistant United States Attorney

CERTIFICATE OF SERVICE

The undersigned attorney for appellee certifies that she has this date served two true and correct copies of the foregoing Brief for Appellee on appellant as follows:

Robert C. Keller, Esquire
Keller, Lisgar & Williams, LLP
101 East Darby Road
Havertown, PA 19083

/s/ Annetta Foster Givhan
Annetta Foster Givhan
Assistant United States Attorney

Date: April 16, 2007

§ 1254. Courts of appeals; certiorari; certified questions

Cases in the courts of appeals may be reviewed by the Supreme Court by the following methods:

(1) By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree;

(2) By certification at any time by a court of appeals of any question of law in any civil or criminal case as to which instructions are desired, and upon such certification the Supreme Court may give binding instructions or require the entire record to be sent up for decision of the entire matter in controversy.

§ 1291. Final decisions of district courts

The courts of appeals (other than the United States Court of Appeals for the Federal Circuit) shall have jurisdiction of appeals from all final decisions of the district courts of the United States, the United States District Court for the District of the Canal Zone, the District Court of Guam, and the District Court of the Virgin Islands, except where a direct review may be had in the Supreme Court. The jurisdiction of the United States Court of Appeals for the Federal Circuit shall be limited to the jurisdiction described in sections 1292(c) and (d) and 1295 of this title [28 USCS §§ 1292(c) and (d) and 1295].

§ 1361. Action to compel an officer of the United States to perform his duty

The district courts shall have original jurisdiction of any action in the nature of mandamus to compel an officer or employee of the United States or any agency thereof to perform a duty owed to the plaintiff.

FIFTH AMENDED TO THE CONSTITUTION OF THE UNITED STATES OF AMERICA

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

FOURTEENTH AMENDED TO THE CONSTITUTION OF THE UNITED STATES OF AMERICA

Section. 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Section. 2. Representatives shall be apportioned among the several States according to their respective numbers, counting the whole number of persons in each State, excluding Indians not taxed. But when the right to vote at any election for the choice of electors for President and Vice President of the United States, Representatives in Congress, the Executive and Judicial officers of a State, or the members of the Legislature thereof, is denied to any of the male inhabitants of such State, being twenty-one years of age, and citizens of the United States, or in any way abridged, except for participation in rebellion, or other crime, the basis of representation therein shall be reduced in the proportion which the number of such male citizens shall bear to the whole number of male citizens twenty-one years of age in such State.

Section. 3. No person shall be a Senator or Representative in Congress, or elector of President

and Vice President, or hold any office, civil or military, under the United States, or under any State, who, having previously taken an oath, as a member of Congress, or as an officer of the United States, or as a member of any State legislature, or as an executive or judicial officer of any State, to support the Constitution of the United States, shall have engaged in insurrection or rebellion against the same, or given aid or comfort to the enemies thereof. But Congress may by a vote of two-thirds of each House, remove such disability.

Section. 4. The validity of the public debt of the United States, authorized by law, including debts incurred for payment of pensions and bounties for services in suppressing insurrection or rebellion, shall not be questioned. But neither the United States nor any State shall assume or pay any debt or obligation incurred in aid of insurrection or rebellion against the United States, or any claim for the loss or emancipation of any slave; but all such debts, obligations and claims shall be held illegal and void.

Section. 5. The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.